85-1810

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STUART GREEN AND LESLIE GREEN,
Appellants,

v.

DEPARTMENT OF HUMAN SERVICES OF THE STATE OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1) Whether West Virginia violated the constitutional prohibition against ex post facto laws and the equal protection and due process clauses of the United States Constitution by retroactive application of an amended child abuse statute to an ongoing judicial proceeding so that a child whose parents faced possible termination of their parental rights became an abused child under the new statute where she was not an abused child under the former statute in effect at the time the proceedings against the parents began.

2) Whether a record establishing a prima facie case of an attorney operating under a severe conflict of interest to the detriment of his parent clients in an involuntary parental rights termination proceeding, when presented to a State appellate court, requires the appellate court under the due process clause of the 14th Amendment to remand the case to the trial court for further fact finding prior to finalizing the involuntary parental termination.

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Notice of Appeal to the Supreme Court of the United States I1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

STUART GREEN AND LESLIE GREEN,

Appellants

V.

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA,

Appellee

On Appeal from the Supreme Court

Of Appeals of West Virginia

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia is set forth in the Appendix A. This order denied the appellants' appeal from the circuit court's order terminating their parental rights in and to their daughter, Tiffany Green.

The findings of fact and conclusions of law

of the Circuit Court of Jefferson County, West Virginia recorded on December 14, 1984, are set forth in the Appendix B. This order reflects the circuit court's decision to terminate the appellants' parental rights.

The findings of fact and conclusions of law of the Circuit Court of Jefferson County, West Virginia recorded on July 3, 1985, subsequent to a rehearing on a motion for modification of the December 14, 1984 judgment are set forth in Appendix C. The circuit court found a significant change in circumstances since December 14, 1984 but refused to modify the previous order terminating the appellants' parental rights. These findings of fact and conclusions of law are included because the Supreme Court of Appeals of West Virginia considered these subsequent findings of fact and conclusion of law prior to refusing the appellants' petition to appeal the December 14, 1984 judgment.

JURISDICTION

Jurisdiction of this Court is invoked pursuant

to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of West Virginia's Child Abuse Statute, W. Va. Code §§49-1-3 et. seq. (Supp. 1985) as applied to the facts of this case by the Supreme Court of Appeals of West Virginia, on the ground that, as applied, it is an ex post facto law repugnant to the Constitution of the United States, art. I, §10, cl. 1.

The order of the Supreme Court of Appeals of West Virginia involuntarily and permanently terminated the natural parental rights of Appellants to their daughter Tiffany Green and was entered on November 7, 1985. A notice of appeal to this Court was filed in the Supreme Court of Appeals of West Virginia and in the Circuit Court of Jefferson County, West Virginia on January 27, 1986. See Appendix I.

In the event the Court does not consider appeal the proper mode of review, Appellants request the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of

ceriorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post fact Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. CONST. art. I, §10, cl. 1

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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QUESTIONS PRESENTED

1) Whether West Virginia violated the constitutional prohibition against ex post facto laws and the equal protection and due process clauses of the United States Constitution by significantly amending its child abuse statute to turn an unabused child into an abused child by statutory definition and then retroactively applying that statute to a proceeding commenced before the amendment to the material prejudice of parents who relied

upon the previous statute in the initial stages of proceedings which resulted in the permanent termination of their parental rights.

2) Whether a record establishing a prima facie case of an attorney operating under a severe conflict of interest to the detriment of his parent clients in an involuntary parental rights termination proceeding, when presented to a State appellate court, requires the appellate court under the due process clause of the 14th Amendment to remand the case to the trial court for further fact finding prior to finalizing the involuntary parental termination.

RAISING THE FEDERAL QUESTIONS

At the earliest stages of the proceedings below, the appellant raised the claims upon which relief is being sought in this Court. As the Supreme Court of Appeals of West Virginia refused the appeal, timely filed therein, and entered its order on November 7, 1985, this matter is appropriately brought to this court by Appeal. Lawrence v. State Tax

Comm'n, 286 U.S. 276, 282 (1932) and e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-90 (1921). In the event the Court does not consider appeal the proper mode of review for any portion of the following, appellant requests that portion be regarded and acted upon as a petition for ceriorari pursuant to U. S. C. §1257(3).

STATEMENT OF CASE

Stuart and Leslie Green lived with their two children, Joseph and Tiffany, in a communal residence owned by John and Dorothy McClellan, located in Jefferson County, West Virginia, and known as "Stonegate". Approximately fifty persons resided there over the many years in a cult, the tenents of which included intense religious indoctrination and absolute obedience. Failure to obey constituted a basis for infliction of protracted punishment and even protracted corporal punishment for children

of tender years.

On October 5, 1982, Joseph Green, the appellants' son, died of shock resulting from blood collecting in his buttocks after he was paddled for disciplinary reasons for between one and one half and two hours by his father. The punishment, within the context of Stonegate, was unusual in result not duration. The Greens' other minor child, Tiffany, remained uninjured but was immediately placed in the custody of the West Virginia Department of Human Services. In criminal proceedings not involved with this appeal, the parents were convicted of involuntary manslaughter, were sentenced, and were incarcerated.

In October and November of 1982, Stuart and Leslie Green were evaluated by Dr. Bradley Soule, a psychiatrist, whose report indicated that Stuart Green was operating under intense religious beliefs. The doctor's report was immediately forwarded to counsel retained by Dorothy McClellen to represent the Greens in involuntary parental

termination proceedings regarding Tiffany Green. Counsel withheld the report from the circuit court and the Department of Human Services for over six months in direct contravention of a court order requiring the immediate filing and service of all such reports. In the child abuse proceeding counsel opposed the State's attempt to establish the existence of a religious cult at Stonegate and advised the Greens to pursue courses which could not help but lead to confrontations with the State Department of Human Services. The effect of these tactics was that the Greens appeared unwilling to cooperate with the State.

Dorothy McClellan, who retained said counsel without consulting with the Greens, was charged criminally for the death of Joey Green. One aspect of the case against her concerned establishment of the cult. According to sworn testimony of the appellants, and others, counsel had frequent contact with Dorothy McClellan during the pendency of the termination proceedings, although he did not

represent her on her criminal charges. Evidence obtained from the termination proceeding was, by statute, shielded from use against the natural parents in criminal proceedings.

The Greens' counsel did, however, expressly point to statutory deficiencies of the West Virginia child abuse statute in force at that time which precluded a finding that Tiffany was abused. A finding of abuse was a necessary prerequisite to the involuntary termination of parental rights. There was no evidence of abuse as to Tiffany. The case was postponed.

Public indignation in regard to the incidents at Stonegate and the difficulties attendant to termination of appellants' parental rights, prompted the State legislature to perform a wholesale restructuring of the statute. Under the new statute resulting from this publicity inspired legislative activity, no evidence as to actual abuse of a specific child needed to be found if another child in the home was abused. Children similarly situated to

Tiffany became abused children by statutory definition. The proceeding was resumed on October 10, 1984. The circuit court retroactively applied the new statute over appellants' objection and at the same time rejected any possibility that Tiffany was an abused child under the former statute. Thereafter, in contravention of long and well established State precedent founded on express allegiance to the Fourteenth Amendment to the United States Constitution, the court placed the burden of persuasion on the natural parents to overcome the taint associated with the death of Joey Green. See e.g. In Re Willis, 207 S.E. 2nd 129, 138 (W. Va. 1973). At the same time the lower court permitted the State to satisfy its burden that the parents were unfit to raise their child by almost exclusive reference to events associated with facts existant some two years earlier.

> "[B]ased on the fact that the [Circuit Court of Jefferson County] is of the opinion that there is no reasonble likelihood that

> the condition of abuse leading to the death of Joey Green can be substantially corrected in the near future pursuant to West Virginia Code Section 49-6-5 as the rehabilitation efforts were begun only after the criminal process as to both parents was at an end and the handwriting was on the wall, it is ADJUDGED AND ORDERED that the child Tiffany Green is not to be returned to her parents, and that all parental rights [are] terminated . . . ."

Appendix B10.

The appeal to the West Virginia Supreme Court was mounted by present counsel on May 15, 1985. West Virginia law does not give effect to involuntary parental termination until all appeals are exhausted.

At request of counsel, the West Virginia Supreme Court of Appeals postponed argument until after the case was reheard on a motion for modification of the termination order. Even though pre-

senting a much more accurate picture of the appellants' rehabilitative progress, to the extent that Tiffany's Guardian ad litem recommended reunification of the family, the appellants were unable to overcome the burden placed on them at the reconsideration hearing. The evidentiary burden placed on the appellants required them to show that the return of the child was in the child's best interest. While the West Virginia Supreme Court reviewed the record of that later hearing it did not grant leave to file exceptions thereto as part of that State appeal.

THE QUESTIONS ARE SUBSTANTIAL

1) Although acknowledging the modern trend to reserve ex-post facto analysis for criminal/penal statutes, the appellants argue an analogy between the sanction of involuntary parental rights termination and criminal/penal sanctions. Both involve the invasion and destruction of fundamental liberty interests. See Santosky v. Kramer, 455 U.S. 745, 753 (1982). This in and of itself is sufficient to

highlight the substantial nature of the federal question associated with the retroactive application of the West Virginia statute. W. VA. CODE §§ 49-1-3; 49-6-5 (Supp. 1985). The circumstances of this case present alternatives to fully equating the child abuse statute to a criminal/penal statute that would still demonstrate the child abuse statute is in direct contravention of the ex-post facto prohibition. U.S. Const., art. I, §10, cl. 1.

Revered authority discloses the real evil sought to be avoided by the ex post facto prohibition is the very evil so particularly present in this case. "[O]he legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceeding . . . ." THE FEDERALIST No. 44 (Madison) 282-83 (Rossiter ed. 1961). The "people of America . . . have seen with regret and indignation that sudden changes and legislative interference, in cases affecting personal rights, become jobs in the hands of the enterprising

and influential speculators . . . ." Id. See also Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Here that evil is manifestly represented in the parental termination proceeding initiated against appellants in 1982. It was a proceeding doomed to fail because Tiffany Green was not abused within the definitions created by the statute in effect at that time. The proceeding was postponed by the State prosecutor for two years, until legislation, in reaction to public indignation at "Stonegate", had been enacted. According to the trial court such legislative enactment was necessary under the circumstances because the previous statute had not defined Tiffany as abused due to her lack of injury. W. Va. Code §49-1-3 (1980) Appendix D.

The real terror in this case was the legislative interference with an ongoing proceeding when it became apparent the State had no case. The Constitution does not allow the States' that type of advantage in actions threatening the fundamental

liberty interests of its citizens. Perhaps a different rule might apply if the legislation did not benefit the State or even if a State were to initiate process after such legislation had been enacted. But this case represents the most egregious form of legislative interference. Evidentiary rules and burdens were changed in midstream. A defense to the proceeding was stripped away after being revealed by the appellants' counsel. Arguments that the public "interest" is served by such legislation, because it promotes the protection children beg the issue. The issue is legislative interference with an ongoing proceeding. This is a substantial Federal question. "No man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today . . . ." THE FEDERALIST No. 78 (Hamilton) 470 (Rossiter ed. 1961). If legislative interference with ongoing proceedings involving fundamental liberty interests is allowed, no family is safe whose destruction is politically expedient.

In addition, the revised definitions of "abused child" deny equal protection as guaranteed by the Fourteenth Amendment of the Constitution of the United States. An uninjured child is defined as abused if another child in the home is abused. W. Va. Code § 49-1-3(a)(l) (Supp. 1985). Concededly such a definition may be necessary to facilitate the immediate and short term protection of children in imminent danger of abuse. However, even if the absolutely unrestrained prospective reach of the definition is ignored because of an "important" governmental purpose, such a purpose is absent in this case. The statute was actually employed in 1984 to create a threat to an uninjured child two years prior to the effective date of the legislation. Unless "imminent danger" is given a whole new meaning, the unescapable sole purpose of retroactive application of this statute in this case was that this definition gave the State the leverage it needed to terminate the appellants' parental rights.

The retroactive application of this statute bears no conceivable rational relationship to a child who has been in State custody for some two years. It does not withstand the higher scrutiny with which statutes effecting parental rights are reviewed.

In regard to due process, the West Virginia revised child welfare statute creates two new presumptions applicable to termination proceedings which, in conjunction with one or perhaps two previously existing provisions permit a relatively early and effortless satisfaction of the State's evidentiary burden in parental termination proceedings. The first is an irrebuttable definition. An uninjured child is defined as abused if another child in the home is abused. W. Va. Code § 49-1-3(a)(l) (Supp. 1985). See also Manley v. Georgia, 279 U.S. 1, (1928) (due process violation). The second presumption appears in the form of a burden of persuasion placed on the parents to demonstrate that the conditions of abuse can be corrected.

Compare W. Va. Code § 49-6-5-(b) (1980) with W. Va. Code § 49-6-5(b) (Supp. 1985). A case of serious abuse, such as resulted in the death of Joey Green, makes this second burden virtually insurmountable. Acknowledging the parents' rehabilitative efforts, the trial court stated "the past always speaks stronger than the future" and denied the parents' motion for modification. Appendix C15.

There are two additional provisions found in both the earlier and more recent versions of the West Virginia child abuse statute which, individually and in combination, also serve to shift the evidentiary burden from the State to the parents. The "present situation of the child" is to be considered by the trial court in determining what disposition would be appropriate for the child after a finding of abuse has been made. See W. Va. Code § 49-6-5(a) (1980) and W. Va. Code § 49-6-5(a) (Supp. 1985). It is within this context of the "present situation of the child" that the

trial court is to determine disposition of the child, guided by the polar star of the child's best interest. In cases such as Tiffany Green's, the psychological bonding which by time alone is formed between the State appointed temporary care-takers and the child, creates a hurdle the parents are forced to overcome in order to gain the reunification of the family. The evidentiary burden of this hurdle is even heavier when parents seek modification of a previously imposed dispositional order under W. Va. Code § 49-6-6 (1980). This increased burden was demonstrated by the trial court's opinion at the conclusion of the hearing on the appellants' motion for modification. The trial court rejected the State's contention that the appellants be required to demonstrate reunification of the family would "materially benefit" the child. See Holstein v. Holstein, 160 S.E. 2d 177 (W. Va. 1968). The trial court applied a somewhat lighter burden to the appellants. However, the burden of persuasion was nonetheless placed upon the parents.

The collective efforts of these presumptions and burdens of persuasion is to shift the evidentiary burden from the State to the parents. This shift renders the statute unconstitutional. Santosky v. Kramer, 455 U.S. 745 (1982). See also Speiser v. Randall, 357 U.S. 513, 524-25 (1958).

The effect of this burden upon the appellants under W. Va. Code § 49-6-6 (1980), can best be demonstrated by the fact that the opinion of Tiffany Green's guardian ad litem, that the appellants had been rehabilitated and that Tiffany should be reunited with her family, carried insufficient force to defeat the burden placed upon the parents under the statute.

That the retroactively applied statute was enacted to deal with the "Stonegate" problem and the resulting public outrage at this religious cult is demonstrated in the record. As understandable as such a reaction is, it cannot be allowed, through political and legislative actions, to impact upon a legal proceeding commenced prior to its formula-

tion. Quick to express moral indignation at the horrors perpetrated by others in the name of righteousness, we should best restrain responsive action within constitutional perimeters, lest our own indignation and self-righteousness overtake us and create in us a variety of that which we condemn.

2) The Supreme Court of Appeals of West Virginia reviewed a record of sworn testimony proffered to demonstrate that the appellants' initial trial counsel had operated under a direct and powerful conflict of interest during his representation of the appellants. After reviewing that record, the Supreme Court of Appeals of West Virginia denied the requested appeal without remanding the case back to the trial court for a determination of whether the appellants had been provided with adequate assistance of counsel as required by West Virginia statute and by West Virginia case law. See State ex rel. LeMaster v. Oakley, 203 S.E. 2d 140, 144-45 (W.Va. 1974). The impact of the advice and assistance of legal counsel on parents

facing possible termination of their parental rights is immeasurable. In this case counsel advised a course of conflict rather than cooperation which was noted by the initial court when the appellants' parental rights were terminated. Of more universal impact, however, is the question of whether a state appellate court is under a duty to remand a case to the trial court when the record before it indicates a conflict of interest on the part of trial counsel. When the appellate court is reviewing a trial court action involving the destruction of fundamental liberty interests, the appellants would argue that the due process and equal protection clauses require such a remand. See Wood v. Georgia, 450 U.S. 261 (1981). The issues associated with this question are important and are applicable to every appellate court reviewing parental termination proceedings.

CONCLUSION

For the aforegoing reasons, summary reversal should be granted, or in the alternative, probable

jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 7th day of November, 1985, the following order was made and entered, to-wit:

Department of Human Services of the State of West Virginia

vs.

Tiffany Green, Infant, etc., et al.

On a former day, to-wit, May 15, 1985, came the petitioners, Stuart Green and Leslie Green, by Richard C. B. Woods, their attorney, and presented to the Court their petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Jefferson County rendered on the 14th day of December, 1984, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: /s/ George W.

A2

Singleton

Clerk Supreme Court of

Appeals

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,

WEST VIRGINIA

SITTING AS A JUVENILE COURT

DEPARTMENT OF HUMAN SERVICES

vs. Petition No. 82-J-74

TIFFANY GREEN, Infant,

LESLIE GREEN, Mother,

STUART GREEN, Father,

Defendants

O R D E R

This matter came on for hearing this 2nd day of October, 1984, upon the papers and pleadings formerly read and had herein; upon the preliminary hearing commenced on the 13th day of October, 1982, at the conclusion of which said hearing the Petitioner did rest its case; upon the subsequent orders entered herein continuing the matter over; upon the calling of the matter on for hearing this day and date; upon the appearance of the Petitioner Joseph Corbin, Jr., in person and by counsel Braun

A. Hamstead, Prosecuring Attorney of Jefferson County, West Virginia; upon the appearance of the Respondent parents in person and by counsel, John C. Skinner, Jr., and upon the appearance of the child in person and by her guardian ad litem, James Crawford; upon the appearance of the divers witnesses in the case.

WHEREUPON the Petition proceeded to call its witnesses, and did place into evidence certain exhibits marked as "Petitioner's Exhibits NO. 1, 2 & 3," to which exhibits the Defendant parents did not object or except.

During the cross-examination of witness for the Petitioner, Dr. Guy Brooks, counsel for the Defendant parents did mark and place into evidence Respondents' Exhibit No. 1, to which the Petitioner did not object or except, and upon the taking of further testimony for the Petitioner, the Court did conclude that a recess was necessary for a period of one hour, and, after a period of that one hour, testimony did resume, at the conclusion

of which the Petitioners did rest their case at this final hearing.

WHEREUPON Counsel for the Defendant parents did make a Motion for Judgement on behalf of the Respondent parents, which said Motion was denied by the Court, and the Respondents did then present evidence by divers witnesses, at the conclusion of which testimony the Respondent parents did rest.

WHEREUPON the Petitioner did present testimony in rebuttal to the testimony offered by the Respondent parents, at the conclusion of which the Petitioners did rest their case in rebuttal.

After hearing the closing arguments of counsel, and in consideration of all evidence presented, the Court does make the following findings of fact:

That all findings of fact made the Court at prior hearings and included in that Order dated July 18, 1984, are hereby incorporated into this Order for all pertinent purposes:

That the testimony of Marcie Kemner, agent for the Department of Human Services, sets forth the fact that at no time during her involvement in the case, a period of some one and one-half years, did the Respondent parents cooperate with her in any way, nor did they express to her any indications of remorse whatsoever;

That the testimony of Dr. Guy Brooks was to the effect that the parent Leslie Green did not cooperate with his testing under an Order of a Circuit Court of West Virginia in a related child abuse and neglect proceeding involving the other sibling of the deceased child, Joseph Marshall Green, so that the sibling could be psychologically tested and evaluated by him in accord with that said Court Order;

That the report of the evaluation made by one Dr. Bradley Soule (at the request of Counsel for the Respondent parents) indicates that the parent Stuart Green was operating under an intense religious belief and felt that the death of the child

was attributale to "God's will;" and further that Dr. Soule expressed reservations about returning the child to her parents.

That Dr. Trevor Stokes, Associate Professor of Psychology at West Virginia University, interviewed the child Tiffany Green and the foster parents, Mr. & Mrs. Glen Niceley, but did not interview the Respondent parents; that in response to a hypothetical question posed by the attorney for the Petitioners incorporating the facts of this case as to whether or not there would be a risk in returning the child to the custody of the parents, the witness responded that there would be a high risk;

That the testimony of Joseph Corbin, Agent of the West Virginia Department of Human Services, established that he was the first Department agent to make contact with the group known as "Stonegate;" that there had been an arrangement between the Department and the Respondent parents regarding certain actions by the parents to reassure

the Department that the parents were making efforts to change their style of interaction with their remaining children; that this arrangement was reduced to writing, and required: (1) a. that the parents would receive psychological counseling and/or therapy, and that the Department would have access to the therapist and to all reports; (1) b. that a local psychologist or psychiatrist was to be utilzied, if at all possible; (2) that the parents attend educational sessions that would teach them parenting skills and the recognition and observation of a child's development process; (3) that the recommendation of the Department depended on when a point in time was reached that the Department felt the children would be safe; (4) the parents would continue to cooperate with the Department through its agents and workers; Mr. Corbin further testified that the parents had fulfilled the requests made of them by the Department:

That Dr. Hiram Sizemore was produced as

a witness on behalf of the parents. He testified that he did not examine the parents until the Fall of 1983; that he had not seen Mrs. Green for the past two or three months due to adventitious circumstances but Mr. Green has been seeing Dr. Sizemore in Shepherdstown although living in Baltimore, Maryland; it was Dr. Sizemore's professional opinion that the Court could with safety return Tiffany to her parents upon certain conditions as follows:

(1) Both parents to continue psychiatric treatment for one to two years;

(2) The children be examined every three months by a physician for evidence of abuse;

(3) The Department of Human Services should continue to supervise the Respondent parents.

Further his examination of both parents could find no mental diseases nor disabilities although they have been suffering from some adjustment disorder which he concluded would be temporary.

That Charles Kirby, witness for the Respondent parents, a child psychologist at Eastern Panhandle

Mental Health Center, conducted the parenting classes for the Respondent parents, at which classes, in his opinion, the Respondent parents made progress; that he did not see any reason why Tiffany Green should not be returned to her parents;

That Dr. Mildred Williams, a general family physician and witness for the Respondent parents, had treated the children of the Respondent parents and the parents prior to the death of Jopseh Marshall Green; that, as far as she could see, there was no reason why the child should not be returned to the parents;

That Glen and Mary Nicely, foster parents of Tiffany Green, with whom the Department had placed Tiffany, were presented to the Court; but the only issue for the Court is whether or not custody should be removed from the parents and vested in the Department.

That the Respondent parents, Leslie and Stuart Green, testified that they realized that they had made a mistake, that they had received benefit

from the parenting classes, and that they would not discipline in that manner in the future; the father Stuart further testified that he was living in Baltimore, Maryland, with his mother. That he is employed as a waiter and that the Greens' other child Julie resides with him in Baltimore and that when Leslie Green is released from jail it is the intention of the Greens to reside in Baltimore with their children.

After hearing all evidence and arguments of counsel, the Court doth make the following conclusions of law:

That the welfare of the child is the polar star which must guide this Court;

That on October 5, 1982, the West Virginia statute made no provisions for the removal of a sibling from the home of an abused child. That the specific authority to remove a sibling was not enacted into the statute until the 1984 sessions, March 10, 1984, effective ninety (90) days from passage.

Accordingly, based on all the evidence presented before it, and based on the fact that the Court is of the opinion that there is no reasonable likelihood that the conditions of abuse leading to the death of Joey Green can be substantially corrected in the near future pursuant to West Virginia Code Section 49-6-5, as the rehabilitation efforts were begun only after the criminal process as to both parents was at an end and the handwriting was on the wall, it is

ADJUDGED and ORDERED that the child Tiffany Green is not to be returned to her parents, and that all parental rights and responsibilities of Stuart and Leslie Green to the child Tiffany Green are hereby terminated, with custody, care and control to be awarded the Department of Human Services with the power to consent to adoption and with further powers to obtain and provide the needed medical and dental attention, to all of which the Respondent parents object and except.

At this time, Counsel for the Respondent

parents did move the Court grant an improvement period, which Motion the Court does overrule, for reasons already upon the record.

WHEREUPON the Court inquired as to all parties present if there was anything further, and Counsel for the Respondent parents indicated that they wished to be furnished with a free transcript of the proceedings in order to appeal the decision of the Court, and, it appearing that the Respondent parents have executed the requisite affidavit of indigency at a prior date, it is

ADJUDGED and ORDERED that the Court Reporter do prepare a transcript free of charge at the earliest convenience of the Reporter.

The Court did then inquire of the guardian ad litem as to whether or not he had any objection to the ruling of the Court, and he indicated that he did not wish to object and except to the ruling contained in this Order.

There being nothing further to consider, the Court did declare the hearing at an end.

This Order was presented to me on December 11, 1984.

/s/ Vance E. Sencindiver

JUDGE

Received and Filed in the
Office of the Clerk of the
Circuit Court of Jefferson
County, WV on 12/14/84
/s/ P.R. Spates
Assistant Deputy Clerk

APENDIX C

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA

vs. JUVENILE

TIFFANY GREEN, Infant PETITION

LESLIE GREEN, Mother No. 82-J-74

STUART GREEN, Father

Portion of proceedings had and testimony taken before the Honorable Patrick G. Henry, III, Judge, on July 3, 1985.

COURT:

All right, thank you. Now I think counsel will agree that in effect if I were an appellate court, this would be a case of first impression. There is virtually no law in this state of any assistance. There are no guidelines, no standards.

According to our statute, there's not even any discretion as to whether or not the Court holds a hearing. It is mandatory. Even to the extent that in the event of a determination of parental rights and let's say the passage of ten years and

the child has been in a prospective adoptive home but for some reason they've never gone through with it, the natural parents would be permitted even with a ten year attachment to prospective parents, to come back into court under an alleged change of circumstances and reopen the entire matter.

We're thankfully in this case not dealing with the passage of ten years time. Effectively we're dealing most concisely with the passage of time from October of 1984 through this date. Which is one of the few things I can be thankful for that we're not going through ten years worth of time, rather we're going through, in effect, directly less than a year and collaterally going back approximately essentially three to four years.

The Court is further concerned about the absence of the pychological profile conducted on Tiffany which was apparently conducted in the summer of 1984. It does not appear of record unless it is with the exhibits that were transmitted to

the State Supreme Court of Appeals. And without knowing what the results were of that evaluation, the Court feels that there is a link missing which could have been of assistance to the Court in placing other expert testimony in its proper perspective.

The statute with which we're concerned deals with a substantial change of circumstances which may justify a change of custody. As I've stated before, by virtue of the polar star concern of the Court for the welfare of the child, somewhere in that statute is the inherent consideration of the child's welfare and that a mere substantial change of circumstances is not sufficient upon which to justify modification. The interests of the child separate and apart from consideration of changes must be considered by the Court in rendering of its decision.

Now whether that standard should be the standard of (Holstein) where the change must be shown to materially promote or whether because we're dealing with the intervention by the state, the

standard to be shown by the Petitioners is less. This Court is without assistance by our state Supreme Court and I will muddle through it the best I can under the circumstances.

I will note for the benefit of counsel that in reviewing the prior proceedings we have some contradictions between the evidence adduced today and prior evidence. Specifically the hearing in October of '84 the testimony of Bradley Soule on Page 50 of the transcript in his evaluation of the Greens of October and November of 1982 found in using the garbage word, no brainwashing. Which is in contradiction to the testimony of Dr. Goldstein who found clear evidence of a cult atmosphere and cult influences on the Greens.

Additionally, Dr. S-T-O-C-K-E-S, I don't know whether its Stoakes or Stockes on Page 58 of the transcript who evaluated Tiffany and except for the actual knowledge to the contrary believed that the relationship between Tiffany and the Nicelys was that of a natural parent and child. That

tends to contradict the testimony of Dr. Rosenberg.

And in considering the evidence at the proceedings for these two cases and the Court must at least note those contradictions in order to place all the evidence in its proper perspective.

Through the testimony of Stuart Green we heard considerable evidence regarding the cult atmosphere of the Stonegate community. And the uniform system of child discipline which progressively became more severe after 1981 and which for the purposes of this proceeding, culminated on October 5, 1982, when he overheard Leslie disciplining his son, Joey, assumed the duties of disciplinarian, and entered into a beating of Joey for a period of two hours which resulted in his death due to hemorrhaging.

There was also considerable testimony as to the events in changes in his life since October of 1984. That he has in effect left the commune atmosphere, that he's residing with his mother and stepfather in Baltimore, that he's undergoing

counseling for which the prognosis is good to excellent and is ongoing.

Dr. Goldstein in his evaluation of the information available to him felt that it was quite clearly a cultist atmosphere, that the Greens were subjected to the whims of Dorothy McClellan to the extent as he characterized it, that dogma took precedence over all human experience. And therefore what happened to Joey Green was not true child abuse in the sense that we commonly think of it.

That is very convenient, psychologically. Unfortunately our statutes in this court are concerned with the result and not the motivation for the damages or injuries that are inflicted on the child. And while motivation or good intentions may act in mitigation, we are still dealing with the death of a child and still dealing with a basic failure of human compassion through the death of Joey, and the death and the severe beatings of other children for protracted periods of time.

And while it is clinically a matter which a

psychologist can deal with, it is a different matter for those who have to deal with the legal culpability and the realities of life.

It is interesting to note that the apparent justification for Dorothy McClellan's dogma was religious in nature and going back as far as Abraham and his son and coming through the Crusades and Spanish Inquisition, it is unfortunately absurdly true that religion is responsible for countless atrocities committed in the name of saving mankind or an individual and this is a matter that the state has always had problems dealing with in the United States because of delineation between church and state. It makes it that much harder to understand how this could have happened in the name of religion. And that much more difficult for the state to justify intervention.

Subject to the contradictions I raised previously, Dr. Rosenberg testified as to the good parent-child relationship existing between the Greens and Tiffany. Based upon his evaluation conducted yesterday

and his opportunity to observe the child in an atmosphere where he could compare the parents and the foster parents. That's also contradicted by the testimony of Jan Adams. Of course, there we get back to the old problem of the lesser qualified expert who has greater contact versus the greater qualified expert who has lesser contact and to what extent courts are willing to recognize the ability of an average individual to correctly identify human nature or to make observations regarding human behavior.

Jan Adams had concern for the present bonding between Tiffany and the Nicelys and was concerned that the passage of three years would result in upheaval to Tiffany if she's removed from the Nicelys at this time. She further indicated that she is not yet satisfied with the progress of the Greens.

The Court then heard the testimony of Ed and Jenny Schlosser, Lawrence Crum, Semore Sandick. Admittedly all relatives of the Greens, but

all in a position to observe changes in behavior and changes in attitude. And although taken with a grain of salt, the Court has no problems in acknowledging that the Greens have undertaken a radical effort to change their lifestyle and through counseling to get back to a normal life.

There is also strong indication of good family support both financially and emotionally and a unification of family efforts towards the uniting of this family. The very strong consideration on behalf of the Greens.

As I've raised to cousel before, I have problems with regard to the status of Julie and allowing that to carry great weight on the plus side for the benefit of the Greens, I acknowledge that there have been no indications presented to the Court of any problems arising with respect to the care and parenting by the Greens to Julie while they've remained in the same household.

This in consideration of the fact that the grandparents have deferred most parenting duties

on behalf of the Greens would show that the Greens are exhibiting a strong sense of active parenting and presumably within the normal acceptable range.

We run then into the testimony of Mrs. Nicely. And though perhaps there may have been matters raised on cross examination which were not as a result of the Greens affection for her, she denoted no change in effect over the past years from 1982 to the present with respect to the Greens conduct, behavior, attitudes. I must also take her testimony with a grain of salt as a result of the obvious emotional bond which she has with Tiffany and while I'm not going to find or allude to a direct intent to mislead the Court, she has a vested interest in not being observant to say the very least.

Through the testimony of Leslie Green I finally found someone from Stonegate who actually acknowledged that they were uncomfortable with the beatings. And at least with respect to her own son being beaten, had to withdraw. I agree with one proposition tendered by Mrs. Green and that

is in effect, if you are not under the influence of the cult, you cannot understand how this could happen. And I don't think that the rest of the world can understand how a parent could stand by and beat a child for two hours doing it in the name of God or to watch another child being beaten for four hours and not intervene.

It is almost akin to Nazi Germany where the blind following of orders was the justification for all inhumanity and was expected to be the exoneration of all culpability. It is incomprehensible to the average person how anyone regardless of the amount of indoctrination can allow this to happen.

Now it may be understandable to the psychologists. But to a parent, I agree with her that I cannot understand it.

We're dealing through the Greens with two individuals who have to date never lived on their own either as a married couple and their relationship with each other or as parents with the sole responsibility of their children. They first lived in their

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respective homes, then at Stonegate, for a period of time each was in jail, and now they're residing with his parents in Baltimore.

There's constantly been that umbrella of protection for what appears to be almost the last 15 years. There's also the consideration that although the prognosis is good with respect to their psychological development, Dr. Goldstein represents that Stuart is detached from the cult and Leslie is less so. And acknowledges that each requires additional therapy.

When questioned by the Court, he acknowledged that there's always the possibility of anxiety. And we have in any normal human relationship with another person or persons a stress created each time there is a change of circumstances.

Psychologists like to have a chart whereby you go down and check off certain things that have happened in your recent past and account a point value to each event. And if you reach a certain total that you should consider counseling.

Events such as a loss of a job or a divorce or change or residence. I have great concern at this point that the Greens are not making it on their own and while I join Mr. Crawford in commending them for breaking from the past and working to the future, I am simply not satisfied that the circumstances to which Tiffany would be returned on this date would be in the best interests of the child in considering the present level of psychological advancement of the parents and of the continued dependency of the Greens on external assistance in order to manage their lives.

The Court considers implicit as a conclusion of law that it must find that the proposed change is in the best interests of the child which I cannot do at this point in time. I do not agree that the (Holstein) standard should attach to the Greens. I don't think the burden is that high upon them to show that it would materially benefit the child. But to uproot the child from what has been a reasonably stable environment for the past three years,

and lodge the child in a home which is now replete with counseling and an impending move from one residence to another, and within some foreseeable time a relocation of the Greens from out of the household of his parents, the Court must consider those future disruptive events in determining that the present status of the child appears to be stable, appears to be beneficial to the welfare of the child, and the Court cannot conclude that the statutory mandates have been met sufficient to justify modification of the prior order of the Court.

Accordingly it is adjudged and ordered that the Petition for Modification be and the same is hereby denied. Counsel, you may show your objection to the Court's ruling.

MR. WOODS:

Thank you, your Honor. I would except and object to the Court's ruling.

Your Honor, this proceeding also would allow the Court to grant a post-dispositional improvement period and I will assume for the sake of this hearing

that such a motion is also at this time denied?

COURT:

It is denied. Once parental rights have been terminated under those circumstances, you can't have an improvement period. Now it may well be that by the time the Supreme Court has had a chance to hear this matter, I may be on my way being referred to as learned counsel which is generally reserved for Judges who get reversed, and that it may be remanded for further hearing. And that by that point in time the progress of your clients may be satisfactory to justify a change.

And I don't want to stop their efforts. I am in a position of weighing the welfare in this proceeding. I am concerned only about Tiffany. Based on past actions and future projections, and unfortunately the past always speaks stronger than the future, and I'm not willing to risk the life of a child unless I'm satisfied.

Now the Court Reporter is directed to insofar as she's humanly possible to do, to give priority

to the preparation of this transcript and the Court hereby directs that a copy of the transcript be made available to counsel for submission and incorporation into his present appeal before the West Virginia State Supreme Court of Appeals.

MR. WOODS:

For the record, also, your Honor, I would like to extend the grateful appreciation of Stuart and Leslie Green and myself as counsel for the tremendous effort that the Court has made to allow this proceeding to continue until its termination and I know we've really -- you've bent over backwards. And we appreciate that and I want to thank you on the record.

Oh, and I would also note, of course, my exception and objection to your denial for the motion -- for an improvement period.

COURT:

This hearing is adjourned.

APPENDIX D

W. VA. CODE § 49-1-3 (1980).

"Abused child" means a child:

Whose parent, guardian or custodian inflicts or attempts to inflict or allows to be inflicted as a result of inadequate supervision, physical injury or substantial emotional injury upon the child which endangers the present physical or mental health of such child or inflicts, attempts to inflict or knowingly allows to be inflicted sexual abuse upon the child.

"Neglected child" means a child:

(1) Whose physical or mental condition is impaired or endangered as a result of the present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education and the condition is not due primarily to the lack of financial means of the parent, guardian or custodian; or

(2) Who is presently without necessary food,

clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian.

"Neglected child" does not mean a child:

(1) Whose parent, guardian or custodian has failed to provide him with medical care because such medical care conflicts with the tenets and practices of a recognized or religious denomination or order of which such parent, guardian or custodian is an adherent or member; or

(2) Whose education is conducted within the provisions of section one [§ 18-8-1], article eight, chapter eighteen of this Code. (1936, 1st Ex.Sess. C. 1: 1941, c. 73: 1977, c. 65: 1978, c. 14.)

APPENDIX E

W. VA. CODE § 49-1-3 (Supp. 1985).

(a) "Abused child" means a child whose health or welfare is harmed or threatened by:

(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or substantial mental or emotional injury, upon the child or another child in the home; or

(2) Sexual abuse or sexual exploitation.

In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

(b) "Abusing parent" means a parent, guardian or other custodian, regardless of his or her age, whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to consititute child abuse or neglect.

(c) "Child abuse and neglect" or "child abuse or neglect" means physical injury, substantial mental or emotional injury, sexual abuse, sexual exploitation

or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child.

(d) "Child abuse and neglect services" means social services which are directed toward:

(1) Protecting and promoting the welfare of the children who are abused or neglected;

(2) Identifying, preventing and remedying conditions which cause child abuse and neglect;

(3) Preventing the unnecessary removal of children from their families by identifying family problems and assisting families in resolving problems which could lead to a removal of children and a breakup of the family;

(4) In cases where children have been removed from their families, providing services to the children and the families so as to restore such children to their families;

(5) Placing children in suitable adoptive homes

when restoring the children to their families is not possible or appropriate; and

(6) Assuring the adequate care of children away from their families when the children have been placed in the custody of the department or third parties.

(e) "Imminent danger to the physical well-being of the child" means an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health or life of any child in the home:

(1) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or babysitter or other caretaker; or

(2) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome; or

(3) Nutritional deprivation; or

(4) Abandonment by the parent, guardian or custodian; or

(5) Inadequate treatment of serious illness or disease; or

(6) Substantial emotional injury inflicted by a parent, guardian or custodian.

(f) "Multidisciplinary team" means a group of professionals and paraprofessionals representing a variety of disciplines who interact and coordinate their efforts to identify, diagnose and treat specific cases of child abuse and neglect. Multidisciplinary teams may include, but are not limited to, medical, child care and law-enforcement personnel, social workers, psychologists and psychiatrists. Their goal is to pool their respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity and follow-up for both parents and children. "Community team" means a multidisciplinary group which addresses the general problem of child abuse

and neglect in a given community, and may consist of several multidisciplinary teams with different functions.

(g) (1) "Neglected child" means a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due priminarly to lack of financial means on the part of the parent, guardian or custodian; or

(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian.

(2) "Neglected child" does not mean a child:

(A) Whose parent, guardian or custodian has failed to provide him with medical care because such medical care conflicts with the tenets and practices of a recognized religious denomination

or order of which such parent, guardian or custodian is an adherent or member; or

(B) Whose education is conducted within the provisions of section one, article eight, chapter eighteen of this code.

(h) "Parenting skills" means a parent's competencies in providing physical care, protection, supervision and psychological support appropriate to a child's age and state of development.

(i) "Sexual abuse" means:

(A) As to a child who is less than sixteen years of age, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

(i) Sexual intercourse; or

(ii) Sexual intrusion; or

(iii) Sexual contact; or

(B) As to a child who is sixteen years of age of older, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

(i) Sexual intercourse; or

(ii) Sexual intrusion; or

(iii) Sexual contact; or

(C) Any conduct whereby a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making such display, or of the child, or for the purpose of affronting

or alarming the child.

(j) "Sexual contact" means sexual contact as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(k) "Sexual exploitation" means an act whereby:

(1) A parent, custodian or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct as that term is defined in section one, article eight-c, chapter sixty-one of this code;

(2) A parent, guardian or custodian persuades, induces, entices or coercies a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or sex organs under circumstances in which the parent, guardian or custodian knows such display is likely to be observed by others who would be affronted or alarmed.

(l) "Sexual intercourse" means sexual intercourse as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(m) "Sexual intrusion" means sexual intrusion as that term is defined in section one, article eight-b, chapter sixty-one of this code.

APPENDIX F

W. VA. CODE §49-6-5 (Supp. 1985)

(a) Following a determination pursuant to section two of this article wherein the court finds a child to be abused or neglected, the court may request from the state department information about the history, physical and emotional condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall given precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the state department;

(4) Order terms of supervision calculated to assist the child and the abusing parent or parents which prescribe the manner of supervision and

care of the child and which are within the ability of the parent or custodian to perform;

(5) Upon a finding that the abusing parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. If the court shall so find, then in fixing its dispositional order, the court shall consider the following factors: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to

be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final.

(b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:

(1) The abusing parent or parents have habi-

tually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such abusing parent or parents have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; or

(6) The abusing parent or parents have incurred emotional illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

(c) The court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months. During this period the parental rights shall not be permanently

terminated and the court shall require the parent to rectify the conditions upon which the determination was based. No more than one such postdispositional improvement period may be granted. The court may order the child to be placed with the parents, a relative, the state department or other appropriate placement during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section.

APPENDIX G

W. VA. CODE § 49-6-5 (1980).

(a) Following a determination pursuant to section two [§ 49-6-2] of this article, the court may request from the state department information about the history, physical condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child and the child's parent or custodian to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his own home under supervision of the state department;

(4) Order terms of supervision calculated to assist the child and the child's parent or custodian which prescribe the manner of supervision and care of the child and which are within the

ability of the parent or custodian to perform;

(5) Upon a finding that the parents or custodians are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen yeras of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child

shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final.

(b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that: (1) The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parenting ability has been seriously impaired and the parent has not responded to or followed through with recommended and appropriate treatment which could have improved the capacity for adequate parental functioning; (2) the parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable foster care plan designed to lead to the child's return to the parent or parents; (3) the parent or parents have not responded to or followed through with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative

agencies designed to reduce or prevent the neglect or abuse of the child, as evidenced by the continuation of substantial or repeated acts of neglect or abuse after the provision of such services; (4) the parent or parents have abandoned the child; or (5) the parent or parents have repeatedly or seriously physically abused the child.

(b) A child taken into protective custody as abandoned under the provisions of this section may be housed by the state department or in any authorized child shelter facility. The authority to hold such child in protective custody as abandoned, absent a petition and proper order granting temporary custody pursuant to section three [§ 49-6-3] of this article, shall terminate by operation of law upon the happening of either of the following events, whichever shall first occur: (1) the expiration of ninety-six hours from the time the child is initially taken into protecive custody, or (2) the expiration of the circumstances which initially warranted the determination of abandonment.

No child may be considered abandoned and custody withheld from such child's parents, parent guardian or custodian presenting themselves, himself or herself in a fit and proper condition and requesting physical custody of such child. No child may be removed from a place of residence as abandoned under this section until after (1) all reasonable efforts to make inquiries and arrangements with neighbors, relatives and friends have been exhausted; or if no such arrangements can be made, (2) the state department may place in the residence a home services worker with the child for a period of not less than twelve hours to await the return of such child's parents, parent, guardian or custodian. Prior to taking a child into protecive custody as abandoned at a place at or near the residence of such child, the law-enforcement officer shall post a typed or legibly handwritten notice at the place the child is found, informing the parents, parent, guardian or custodian that the child was taken by a law-enforcement officer, the name,

address and office telephone number of the officer, the place and telephone number where information can continuously be obtained as to the child's whereabouts, and if known, the worker for the state department having responsibility for the child.

(c) A child taken into protective custody pursuant to the provisions of this section for emergency medical treatment may be held in a hospital under the care of a physican against the will of such child's parents, parent, guardian or custodian for a period not to exceed ninety-six hours. The parents, parent, guardian or custodian may not be denied the right to see or visit with such child in a hospital. The authority to retain a child in protective custody in a hospital as requiring emergency medical treatment shall terminate by operation of law upon the happening of either of the following events, whichever shall first occur: (1) When the condition, in the opinion of the physican, no longer required emergency hospitalization, or (2) upon the expiration

of ninety-six hours from the initiation of custody, unless within such time, a petition is presented and a proper order obtained from the circuit court.

(d) Prior to assuming custody of a child from a law-enforcement officer, pursuant to the provisions of this section, a physician or worker from the state department shall require a typed or legibly handwritten statement from such officer identifying such officer's name, address and office telephone number and specifying all the facts upon which the decision to take the child into protective custody was based, and the date, time and place of the taking.

(e) Any worker for the state department assuming custody of a child pursuant to the provisions of this section shall immediately notify the parents, parent, guardian or custodian of the child of the taking of such custody and the reasons therefor, if the whereabouts of the parents, parent, guardian or custodian are known or can be discovered with due diligence; and if not, notice and explanation

shall be given to the child's closest relative, if his or her whereabouts are known or can be discovered with due diligence within a reasonable time. An inquiry shall be made of relatives and neighbors, and if a relative or appropriate neighbor is willing to assume custody of the child, such child shall temporarily be placed in such custody.

(f) No child shall be taken into custody under circumstances not jusified by this section or pursuant to section three [§ 49-6-3] of this article without appropriate process. Any retention of a child or order for retention of a child not complying with the time limits and other requirements specified in this article shall be void by operation of law.

(g) As sued in this section:

(1) "Abandoned" means to be without supervision or shelter for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child;

(2) A "law-enforcement officer" means a law-enforcement officer of the department of public safety, a municipality or county sheriff's department;

(3) A "condition requiring emergency medical treatment" means a condition which, if left untreated for a period of a few hours, may result in permanent physical damage; such a condition includes, but is not limited to, profuse or arterial bleeding, dislocation or fracture, unconsciouness and evidence of ingestion of significant amounts of poisonous substance. (1980, c. 25.)

APPENDIX H

W. VA. CODE § 49-6-6 (1980).

Upon motion of a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order: Provided, that a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5] shall not be modified after the child has been adopted. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department. (1977, c. 65.)

APPENDIX I

IN THE SUPREME COURT OF APPEALS

OF THE STATE OF WEST VIRGINIA

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA

vs. PETITION FOR WRIT

TIFFANY GREEN, Infant OF ERROR AND

LESLIE GREEN, Mother SUPERSEADEAS

STUART GREEN, Father

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given by LESLIE GREEN, mother above-named, and STUART GREEN, father above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of the State of West Virginia, refusing an appeal, entered in this action on November 7, 1985.

This appeal is taken pursuant to 28 U.S.C. §1275(2).

/s/Richard C.B. Woods

Counsel for Appeallants

Leslie and Stuart Green

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 27th day of January, 1986, a copy of the aforegoing NOTICE OF APPEAL was mailed, via first class mail, postage prepaid, to Michael J. Cassell, Esquire, Assistant Prosecuting Attorney for Jefferson County, P.O. Box 729, Charles Town, West Virginia 25414, attorney for the Department of Human Services; James B. Crawford, III, Esquire, P.O. Box 711, Charles Town, West Virginia 25414, guardian ad litem for Tiffany Green, Infant; George W. Singleton, Clerk of the Supreme Court of Appeals of West Virginia Charleston, West Virginia 25305; and the Circuit Court for Jefferson County, West Virginia, Court House, Charles Town, West Virginia 25414.

/s/ Richard C.B. Woods

title thereof, *unless due to the fault or cause of the tenant,*[13] . . . shall be paid out of principal." Tex. Rev. Civ. Stat. Ann. art. 7425b-36 (Vernon 1960 & Supp. 1982-1983) (emphasis added).[14]

[24] Based upon this last-cited Texas statutory provision, the district court found that the Trustees' allocation of litigation expenses between the corpus and the income account was proper. We like the district court are unable to find any reason suggested by the record that the Trustees abused their trust-entrusted discretion by paying litigation expenses from the income (of which duPont III was trust beneficiary) rather than from the principal of the trust (of which duPont IV was the principal beneficiary). Under the cited Texas statute, litigation expenses could be charged to income rather than principal when resulting from "the fault or cause" of duPont III.

---

13. The Texas Trust Act defines "tenant" as "the person to whom income is presently or currently payable." Tex. Rev. Civ. Stat. Ann. art. 7425b-4(H).

14. Although Art. 7425b was repealed in 1983 when the Texas Trust Code was enacted, *see supra* note 10, it applies to all transactions—including payments of litigation expenses—occurring prior to January 1, 1984. Texas Trust Code § 111.006 (Vernon 1984).

DuPont III argues that Art. 7425b-36 is inapplicable, since the Trust instrument itself specifies how Trust expenses should be allocated. However, the Trust instrument merely invests the Trustees with discretion to allocate expenses between income and principal, and states that this discretion must be exercised reasonably, without favoring one beneficiary over another; it does not contain any specific requirements that supersede the principles enumerated in Art. 7425b-36. *Cf. supra* note 12. The question presented by duPont III's claim regarding the allocation of litigation expenses is whether the Trustees exercised their discretion reasonably. In the absence of evidence of the settlor's intent regarding how this discretion should be exercised, we must rely on general principles of what constitutes a reasonable exercise of discretion, including the principles enumerated in Art. 7425b-36 of the Texas Trust Act, which we regard as dispositive of Texas's policy on this question.

No reason is shown that the Trustees' exercise of their discretion arbitrarily favored duPont IV or that the Trustees did not act reasonably and in good faith toward assuring to the successive beneficiaries the full enjoyment of their respective interests, by their determination that the litigation expenses caused by duPont III's belated and essentially meritless attack upon the Trust he had created should be charged to his income interest rather than to the principal, of which duPont IV was the principal beneficiary.

IV

Robert Benchley once remarked that "there are several ways in which to apportion the family income, all of them unsatisfactory."[15] DuPont III seems to have learned this lesson the hard way. Having made one disposition of his property to shield it from his former wife, he now seeks a different result. We agree with the district court that duPont III has not justified revoking or reforming the Trust, which by its terms is irrevocable. We also uphold the district court's findings that duPont III failed to show either that removal of the Trustee is warranted due to hostility, or that the litigation expenses of the Trustees should not have been paid by the Trust, and the district court's finding that the Trustees did not abuse their discretion by allocating the litigation expenses to the income rather than the principal of the Trust.

We also remand to the district court the question of whether Nemours Plantation and Harridge House were effectively transferred to the Trust. A fundamental aspect

15. We might add that when there is so much money to go around, many families might welcome the duPont's state of dissatisfaction.

of due process is the right to be heard. Rendering judgment based only on the evidence of one party offends a litigant's most precious constitutional rights. Here, the district court in effect denied the appellants an opportunity to present their evidence, by initially granting the appellants' motion to dismiss but later ruling against the appellants with regard to a substantial issue in the case. This violated Rule 41(b) and denied the appellants due process.

Finally, we order the district court, on remand, to determine appropriate guardian and attorney ad litem fees for duPont IV.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

APPENDIX C

28 U.S.C. § 1332(a):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

APPENDIX D

Federal Rule of Civil Procedure 41(b):

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

APPENDIX E

Federal Rule of Civil Procedure 46:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

APPENDIX F

Federal Rule of Evidence 103(a):

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

APPENDIX G

Texas Revised Civil Statutes, Article 7425b-26:

> This Act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen in all cases where an express trust has been created; except that in the establishment of the principal, provision may be made touching all matters covered by this Act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwist contrary to law, shall control notwithstanding this Act.

Supreme Court, U.S.
FILED
MAR 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1311

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STUART GREEN AND LESLIE GREEN,

Appellants,

v.

DEPARTMENT OF HUMAN SERVICES OF THE STATE OF WEST VIRGINIA,

Appellee.

On Appeal From the Supreme Court of Appeals of West Virginia

MOTION TO DISMISS

CHARLES G. BROWN
Attorney General

SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record

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COUNSEL FOR APPELLEE

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MOTION TO DISMISS

The respondents, West Virginia Department of Human Services and the State of West Virginia, hereby move to dismiss the Petition for Appeal previously filed in this case on the ground that this Court lacks jurisdiction to hear this matter. No federal question was raised below.

The petitioners herein, Stuart and Leslie Green, filed a Petition for Appeal from the judgment of the Circuit Court of Jefferson County, West Virginia, with the West Virginia Supreme Court of Appeals on May 10, 1985. This petition was denied on November 7, 1985.* The lengthy Petition for Appeal is reproduced as the Appendix to this motion.

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* In West Virginia, there are no appeals of right to the West Virginia

The issues raised in this case were not presented to the West Virginia Supreme Court of Appeals as federal questions. Rather, appellants raised only issues of state law in that petition.

The first issue related to appellants' assertion that the state had retroactively applied the 1984 amendments to W. Va. Code § 49-6-1 et seq., to the appellants. As is clearly shown at pages 97-109 of the Appendix, no federal claims were raised in the Petition for Appeal. Rather, this claim, when raised in state court, was based entirely on state common law principles of statutory interpretation.

Supreme Court of Appeals. Any petition for appeal may be accepted by that court and heard on the merits, or else refused by that court. Rule 7, West Virginia Rules of Appellate Procedure.

The second issue relates to the conduct of appellants' counsel. This issue is found at pages A-132 to A-141 of the Appendix. Again, appellants failed to raise any federal issues, predicating their right to counsel exclusively a state statute. W. Va. Code § 49-6-2(a).

MEMORANDUM OF LAW

It is axiomatic that the United States Supreme Court lacks jurisdiction to hear an appeal based upon federal law of a decision by a state's highest court where the federal questions were not raised before the state court. Cohen v. California, 403 U.S. 15 (1971); Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). An examination of appellants' Petition for Appeal before the West Virginia Supreme Court of

Appeals reveals that the federal questions simply were not raised.

In addition, the second issue, relating to effectiveness of counsel, does not truly raise a federal question. Appellants compare the termination of parental rights to criminal penalties; however, this Court has specifically rejected such a comparison. Lassiter v. Department of Social Services, 452 U.S. 18 (1981). In Lassiter, it was held that the Due Process Clause of the Fourteenth Amendment did not require that counsel be provided to indigent parents in every parental status termination proceeding. In this case, the appellants had counsel of their own choosing. While appellants may have grounds for a malpractice suit against their former counsel, and/or grounds to

file a complaint against him for unethical practices (Chapter III, Rules and Regulations of the West Virginia State Bar), appellants' complaints regarding their attorney simply do not rise to the level of a deprivation of federal constitutional rights.

Finally, petitioners have styled this matter as an "appeal." However, if this Court construes it as a petition for wri of certiorari, it should be denied for lack of jurisdiction. The failure to raise a federal question below is fatal to this Court's certiorari jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969).

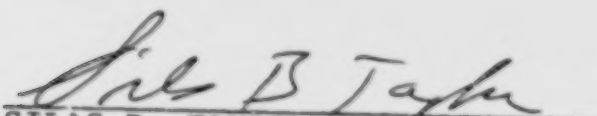
CONCLUSION

The Jurisdictional Statement filed in this case incorrectly asserts that the federal questions raised therein had been presented to the West Virginia

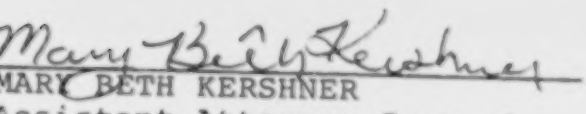
preme Court of Appeals. In addition, the second question raised by appellants is not truly a federal question at all. For these reasons, appellees move to dismiss the appeal in this case.

Respectfully submitted,

CHARLES G. BROWN
ATTORNEY GENERAL



SILAS B. TAYLOR
Deputy Attorney General



MARY BETH KERSHNER
Assistant Attorney General

State Capitol, Room 26-E
Charleston, West Virginia
25305
(304) 348-2021

Counsel for Appellees.

CERTIFICATE OF SERVICE

I, Silas B. Taylor, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the enclosed Motion to Dismiss upon Richard C. B. Woods, counsel for appellants, by causing three (3) copies thereof to be placed in a United States mailbox, first-class postage prepaid, this 7th day of March, 1986, addressed as follows:

Robert C. B. Woods, Esquire
Suite 438,
10 N. Calvert Street,
Baltimore, Maryland 21202

Silas B. Taylor
SILAS B. TAYLOR

SUPREME COURT OF THE UNITED STATES

Statement setting forth the details of filing by depositing in the United States mail with first-class postage prepaid, Jurisdictional Statement.

I, Silas B. Taylor, a member of the Bar of the United States Supreme Court, hereby make this statement in accordance with Rule 28.2 of the Rules of the United States Supreme Court.

I do hereby state and certify that the foregoing Jurisdiction Statement in No. 85-1311, Stuart Green and Leslie Green v. Department of Human Services of the State of West Virginia, was filed pursuant to Rule 28 of the Rules of the United States Supreme Court, by depositing the original copy in the United States Mail, first-class postage prepaid, and addressed to:

Alexander L. Stevas, Clerk
United States Supreme Court
Washington, D. Ct. 20543

on the 7th day of March, 1986.

Silas B Taylor
SILAS B. TAYLOR

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Martha Lou Kubas, a Notary Public for the aforesaid State and County, do hereby certify that Silas B. Taylor, whose name is signed to the foregoing document, dated the 7th day of March, 1986, has acknowledged the same before me on this 7th day of March, 1986.

My commission expires July 19, 1994.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
MARTHA LOU KUBAS
State Capitol, Room E-26
Charleston, WV 25305
MY COMMISSION EXPIRES JULY 19, 1994

Martha Lou Kubas
Notary Public

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

DEPARTMENT OF HUMAN SERVICES
OF THE STATE OF WEST VIRGINIA

vs. PETITION FOR WRIT OF ERROR AND SUPERSEDEAS

TIFFANY GREEN, Infant
LESLIE GREEN, Mother
STUART GREEN, Father

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS AND
GEORGE W. SINGLETON, CLERK
WEST VIRGINIA SUPREME COURT OF APPEALS
STATE CAPITAL, CHARLESTON, WEST VIRGINIA

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This proceeding is an appeal, by the Petitioners, Stuart Green and Leslie Green, from an Order dated October 2, 1984, wherein the Circuit Court of Jefferson County, West Virginia, adjudged the Petitioners' infant child, Tiffany Green, to be an abused child within the meaning of West Virginia Code

§ 49-1-3(a) [1984], ordered the permanent termination of the Petitioners' parental rights and responsibilities in and to Tiffany Green and committed the infant, Tiffany Green, to the permanent guardianship of the Department of Human Services with the power to consent to adoption.

STATEMENT OF FACTS

On October 5, 1982, Joseph Green, the son of Leslie Green and Stuart Green, died at the Jefferson Memorial Hospital. A subsequent investigation revealed that Joseph Green died from shock as a result of blood collecting in massive amounts in his buttocks. The blood was drawn to the buttock area by numerous blows from a wooden paddle wielded momentarily by Leslie Green and then, for a prolonged period of time by Stuart Green. The paddling had lasted

between one and a half and two hours and had taken place at a communal residence owned by John and Dorothy McClellan, located in Jefferson County, West Virginia, and known as "Stonegate".

On October 5, 1982, Joseph F. Corbin, Jr., a Juvenile Probation Officer of the West Virginia Department of Welfare [now the West Virginia Department of Human Services], appeared before the Honorable Judge Pierre E. Dostert, related a brief factual version of the death of Joseph Green, informed Judge Dostert that Stuart and Leslie Green had another minor child aged approximately one year old who lived at Stonegate, and requested Judge Dostert to issue an Order authorizing Mr. Corbin to take custody of and remove this other child, Tiffany Green, from Stonegate. On October 5, 1982, Judge Dostert signed

just such an Order reflecting his finding "that there appears imminent danger to the physical well being of the child and no reasonable alternatives of removal of the child from the home". Order of October 5, 1982. Mr. Corbin removed Tiffany Green from the custody of her mother on October 5, 1982.

On October 6, 1982, Mr. Corbin, on behalf of the West Virginia Department of Welfare [hereinafter "the Department"], filed a petition in the juvenile Court of Jefferson County, realleging the death of Joseph Green at the hands of Stuart and Leslie Green, the perceived danger to Tiffany Green and the agreement of the Department and the Greens that if Tiffany Green were removed, a volunteer and previous babysitter, Mary Nicely, would be an appropriate person to care for the child

temporarily. The petition requested that counsel be appointed for all parties (including Tiffany Green), that temporary custody of Tiffany Green be granted to the Department, that Tiffany Green be adjudged an abused child within the meaning of W.Va. Code 49-1-3 as then amended, and that custody of Tiffany Green be granted permanently to the Department.

On October 6, 1982, the Honorable Judge Vance E. Sencindiver issued an Order, in response to Mr. Corbin's petition, appointing individual counsel for Stuart Green, Leslie Green and Tiffany Green and scheduling a hearing in the case for October 13, 1982. As reflected in the petition of Mr. Corbin, at the time of Judge Sencindiver's October 6, 1982 order, Stuart Green was

incarcerated in the Jefferson County Jail.

On October 7, 1982, the attorney appointed to represent Leslie Green moved to have his appearance withdrawn due to his receipt of privileged information from a person with an interest adverse to that of Leslie Green. On October 7, 1982, Judge Sencindiver signed an Order withdrawing that attorney's appearance.

On October 13, 1982, in Martinsburg, West Virginia, at the Circuit Court House of Berkeley County, a hearing was held whereat the Department presented evidence of the death of Joseph Green as detailed hereinabove. At the conclusion of the Department's case on October 13, 1982, Judge Sencindiver granted a continuance upon the request of counsel for Stuart and

Leslie Green and ordered temporary custody of Tiffany Green to continue in the Department.

On October 19, 1982, at the request of Stuart Green, Leslie Green and a private attorney, retained to represent them by Dorothy McClellan, the hearing was continued until November 23, 1982, by order of Judge Sencindiver. The continuation was requested to enable Stuart and Leslie Green to undergo a psychiatric examination. The October 19, 1982 order of Judge Sencindiver specifically ordered Stuart and Leslie Green to provide copies of any written psychiatric reports they may receive to both the State of West Virginia and to counsel for Tiffany Green. The order continued temporary custody of Tiffany Green in the Department, with the

consent of Stuart and Leslie Green, until November 23, 1982.

On November 19, 1982, counsel for the Department moved for a continuance of the November 23, 1982 hearing because the psychiatric evaluation of Stuart and Leslie Green would not be complete by that date and because counsel for the Department would not be available on that date. No objection to the continuance was made by the attorneys for Stuart Green, Leslie Green or Tiffany Green. On November 19, 1982, Judge Sencindiver ordered: ". . . the preliminary hearing previously set down on the November 23, 1982 is continued generally, and that the matter will be rescheduled again upon order of this Court. Custody is continued in the West Virginia Department of Welfare." Order of November 19, 1982.

In October and November of 1982, Stuart and Leslie Green were evaluated by Bradley Soule, M.D., a medical doctor licensed to practice psychiatry in the State of West Virginia. Despite Judge Sencindiver's order of October 19, 1982, and despite Dr. Soule forwarding written reports of his psychiatric evaluations to counsel for Stuart and Leslie Green in November, 1982, [Tr. p. 57] counsel for Stuart and Leslie Green did not submit said psychiatric reports to the Court or to counsel for the Department or to counsel for Tiffany Green until June, 1983 [Tr. p. 46].

In November, 1983, a meeting was held between Stuart and Leslie Green, their counsel and representatives of the Department. The Department and Leslie and Stuart Green entered into an agreement whereby Stuart and Leslie Green

were to attend parenting classes and therapy sessions with a psychiatrist mutually acceptable to the Greens and the Department. Stuart and Leslie Green attended said parenting classes in March, April and May on the referral of Mr. Corbin of the Department and participated in said classes with enthusiasm [Tr. p. 156-157]. Stuart and Leslie Green also began therapy with the mutually accepted psychiatrist and continued to attend each therapy session scheduled by said psychiatrist. The agreement of the parties on the selection of the psychiatrist was evidenced in a February 24, 1984 Order signed by Judge Sencindiver which directed the Sheriff of Jefferson County to transport Stuart Green to the parenting classes and to Dr. Sizemore's offices for therapy.

No papers or proposed orders were filed with the Court between November 19, 1982 and June 29, 2984 except for the February 24, 1984 order signed by Judge Sencindiver documenting and authorizing the parenting classes and therapy agreed upon between the Department and Stuart and Leslie Green. On June 29, 1984, counsel for the Department, the Prosecuting Attorney for Jefferson County, filed a notice of final hearing in this case and a notice for a hearing on his contemporaneously filed Motion for Release and Disclosure of Psychological and Psychiatric Evaluation of Leslie Green and Stuart Green ["Motion for Release"]. The Motion for Release sought the release of the evaluations performed of Stuart and Leslie Green by Dr. Soule for use in the pending criminal action "State of West

Virginia v. Dorothy McClellan, which involves the prosecution of an individual believed by the State of West Virginia to be the leader of the cult who caused the death of Joey Green, deceased child of the Respondent parents herein, whose death prompted the filing of this child neglect and abuse proceeding." Motion for Release p. 1. The Motion for Release sought to obtain the Court's approval for the release of the psychiatric evaluations from the legislatively imposed confidentiality established by W. Va. Code §49-7-1. The Motion for Release went on to state: "It is the State's theory of that criminal proceeding [State v. Dorothy McClellan], that the said Defendant McClellan 'brainwashed' the Green parents into a disciplinary belief system wherein the child is required to

submit to outside authority, the authority becoming the ends rather than the means to another objective. Accordingly, child abuse becomes predictable, characteristic and common to such cult life." Motion for Release p. 2.

On July 18, 1984, the "preliminary" hearing which commenced on October 13, 1982 was resumed at the Circuit Court House of Berkeley County, Martinsburg, West Virginia. The attorney for Stuart and Leslie Green objected to the holding of any dispositional or final hearing on July 18, 1984, but did present witnesses to conclude their portion of the "preliminary" hearing. At the conclusion of the evidence in the "preliminary" hearing, Stuart and Leslie Green moved to dismiss the petition on the grounds that the petition stated no cause of action under the child abuse and neglect

statute existing at the time of the filing of the petition, since the Department had shown no acts of abuse toward Tiffany Green. Order of July 18, 1984 p. 2. Stuart and Leslie Green also moved for an improvement period and placed into the record evidence of their continuing efforts to participate in the rehabilitation agreement entered into with the Department in writing on December 5, 1983, including attendance at parenting classes and psychiatric therapy. At the conclusion of the July 18, 1984 hearing, Judge Sencindiver denied Stuart and Leslie Green's motions to dismiss the petition and for an improvement period. A transcript of the July 18, 1984 hearing has been ordered and will be forwarded to this Honorable Court when received by the Clerk of the Circuit Court of Jefferson County.

On September 11, 1984, Judge Sencindiver signed an order, dated July 18, 1984, excepted and objected to by Stuart and Leslie Green, which stated as reasons for denying the Green's motion to dismiss the petition:

> "1. That the Petitioner's (the Department's] argument that Tiffany is an abused child within the meaning of the former statute, carries little weight because the legislature would not have needed to reinact a statute to address the situation had the old statute applied in such circumstances.
>
> 2. That the new statute is not a criminal-penal statute, and it contains no language whatsoever as to its retroactive effect nor its prospective effect, the legislature simply is not addressing the question.
>
> 3. That while retroactive application of this law has not been prohibited by the legislature, it has repealed the old law, and therefore is the only statute under which we now can operate."

Order of July 18, 1984 page. 2-3.

The order signed on September 11, 1984 and dated July 18, 1984, stated the following as the Court's foundation for denying an improvement period:

> "1. That the deceased child, Joseph Green, died on October 5, 1982, and was the son of Leslie Green and Stuart Green the respondents in this case and at the time of his death he was aged approximately two (2) years.
>
> 2. The medical evidence in this case pertaining to the death, reveals and indicates that Joey Green died as a result of bruises and contusions to his buttock area, and bleeding, and a loss of blood to his vital organs, and heart failure.
>
> 3. That the said parents, Stuart Green, and Leslie Green, have each been convicted of the offense of causing the child's death, Stuart Green by a plea of guilty, and Leslie Green, by trial and conviction, the appeal of which has been rejected by the West Virginia Supreme Court of Appeals and therefore both convictions are final.
>
> 4. That the Trooper who took the statement of Stuart Green testifies that the

mother, Leslie Green, according to the statement of Stuart Green, began the paddling, and the father then took up the paddling, and paddled Joey Green for two (2) hours because Joey Green would not say he was sorry and apologize for allegedly striking another infant child living at the dwelling known as Stonegate.

5. That since the incident resulting in the death of Joey Green, Julie Green was born on October the 11th, 1982, some six (6) days after the death of Joey Green, and she resided at Stonegate and is still at Stonegate, subject to the supervisory custody order over the said child and other children at Stonegate, entered by another Judge in another proceeding.

6. That Tiffany Green, at the conclusion of the Petitioner's evidence at the preliminary hearing previously commenced herein was placed with the Nicelys at the request of the parents with the technical custody vested in the Department of Human Services.

7. That the Respondent parents Stuart and Leslie Green, continue to live at Stonegate.

And in consideration of all of which, for the reasons

> set forth on the record, the Court does find that there is ample compelling evidence and cause in this case for denying the motion for an improvement period and the Court does deny the said motion for an improvement period, and the status quo in this case is continued over, until further order of the Court."

Order of July 18, 1984, p. 3-5.

On October 2, 1984, a final hearing was held before Judge Sencindiver at the Berkeley County Courthouse, Martinsburg, West Virginia. The Department called Marcie Kemner, a child support specialist for the Department as its first witness. Ms. Kemner testified that she was a case worker on the Tiffany Green case between October 5, 1982 and January of 1984 [Tr. p. 5]. She stated that based upon her observations in October, 1982, she did not see any strong evidence of parental bonding between Tiffany Green and her parents [Tr. p.

6]. She further testified that she hadn't seen any sings of remorse from Stuart and Leslie Green [Tr. p. 8] and that Stuart and Leslie Green had not specifically discussed any feelings about changes in parental discipline with her [Tr. p. 8]. She testified that the Department had decided to allow a sibling sister of Tiffany, Julie Green, to live with her parents in Baltimore [Tr. p. 12]. Between Ms. Kemner's direct and cross examination, Judge Sencindiver, sua sponte, placed in the record the fact that Julie Green, the sister of Tiffany Green, was not the subject of the instant proceedings and that he, Judge Sencindiver, had nothing to do with Julie Green being in her father's hands in Baltimore [Tr. p. 13]. On cross-examination, Ms. Kemner testified that she had heard Stuart and

Leslie Green had attended parenting classes at the Eastern Panhandle Mental Health Center, but that she had not seen the report of those classes because her involvement in the case ended in January of 1984 [Tr. p. 15]. She also testified that she recommended to the Greens that they "attempt to get the case back into Court for the custody hearing because of the duration of time that she was in care and the interruption of their relationship and their reply always was that I needed to consult with their attorney because of the pendency of the criminal proceedings" [Tr. p. 16]. Ms. Kemner stated that Stuart and Leslie Green "did not seem to try to participate in bringing the hearing on again," [Tr. p. 16] and that any discussions she tried to initiate on child rearing practices with the Greens would meet

with responses that she would have to talk with their attorney because they couldn't talk to her about it [Tr. p. 19]. She also testified that she had no knowledge of any indication that either Stuart or Leslie Green had used corporal punishment against Julie Green since October 5, 1982 [Tr. p. 17].

The Department next called State Trooper John Jefferies to testify. Through the testimony of Trooper Jefferies, the Department introduced two photographs of the body of Joseph Green and the statement of Stuart Green taken by Trooper Jefferies at the hospital on the day of Joseph Green's death [Tr. p. 21-25].

Guy H. Brooks was the next witness called by the Department. Mr. Brooks had been ordered by another judge in another proceeding to conduct

psychological tests on Julie Green and other children at Stonegate [Tr. p. 26-27]. Mr. Brooks is a certified school psychologist in West Virginia but is not licensed as a psychologist in West Virginia [Tr. p. 28]. Over the objections of counsel for Stuart and Leslie Green, Mr. Brooks was allowed to testify as an expert [Tr. p. 30]. Mr. Brooks then testified that when he arrived at a previously agreed time and place to conduct psychological testing of Julie Green, Leslie Green, on the advice of her attorney, refused to allow the tests to be conducted unless said tests were videotaped. When Mr. Brooks refused to allow videotaping, Leslie Green read a statement from her attorney to assembled reporters that the testing would not take place unless videotaped. Mr. Brooks testified that Julie Green

was being held by Leslie Green during this occurrence and that Julie Green was upset [Tr. p. 31-32]. Mr. Brooks then testified that Leslie Green's behavior in refusing to allow the testing was, in his expert opinion, inconsistent with the first step in changing behavior, that is, recognizing the existence of the problem [Tr. p. 33-34]. On cross-examination, Mr. Brooks testified that the incident regarding the refusal of Julie Green's testing lasted less than half an hour [Tr. p. 38].

Dr. Bradley Soule, a psychiatrist licensed to practice psychiatry in West Virginia, was next called as a witness by the Department and was qualified as an expert psychiatrist witness without objection [Tr. p. 42]. Dr. Soule testified that he conducted a psychiatric evaluation of Stuart and Leslie

Green in October of 1982 at the request of their attorney "Tr. p. 44]. The tests consisted of interviews with both of the Green parents and the performance of a Minnesota Multiphasic Personality Inventory [MMPI] on both the Green parents [Tr. p. 46-47]. Based upon those evaluations, Dr. Soule had grave reservations concerning the Greens having custody [Tr. p. 47].

On cross-examination, Dr. Soule testified that Stuart Green did express remorse to him at the time [Tr. p. 48] and that he found no indication of mental illness, in a formal sense, in either Stuart Green or Leslie Green, although both expressed a great deal of denial in service of their intense religious beliefs [Tr. p. 49-50]. Dr. Soule testified, in response to a question from Stuart and Leslie Greens'

counsel, that he saw no evidence of brainwashing on the part of Stuart and Leslie Green [Tr. p. 50]. Dr. Soule's report was placed into evidence [Tr. p. 51].

Dr. Soule was questioned by the guardian ad litum for Tiffany Green and it was established that Dr. Soule had not seen either of the Greens since October of 1982, that his opinion still stood, and that his reservations were based upon his opinion that the Greens were not possessed of a good sense of judgment in regard to child rearing because, in following their intense religious beliefs, they spanked a child for over two hours [Tr. p. 53].

Dr. Soule then testified that generally one can learn to be a better parent [Tr. p. 54], that therapy would help the Greens [Tr. p. 54] but that

therapy would have been made difficult by the legal custody and criminal issues at stake in which the Greens were then caught up ¼Tr. p. 55]. It was established that Dr. Soule mailed his report to the attorney for Stuart and Leslie Green on November 17, 1982 [Tr. p. 57] but that their attorney did not present a copy to the attorney for the Department until June of 1983 [Tr. p. 46].

The next witness presented by the Department was Dr. Stokes, a professor of psychology at the University of West Virginia. Dr. Stokes has a P.hD. in psychology and is licensed as a psychologist in the State of West Virginia. He was appointed to the Child Clinical Psychological Program at the University of West Virginia. He was accepted as an expert in child psychology by the Court without objection. [Tr. p. 58-59]. Dr.

Stokes testified that he had met Tiffany Green and her temporary caretakers, Mr. and Mrs. Nicely, the night before the first time. After observing the Nicelys and Tiffany for a period of somewhat under one hour, Dr. Stokes concluded that Tiffany was a well adjusted 3 year old who had a close, warm relationship with Mr. and Mrs. Nicely. He further gave his opinion that the development of Tiffany was probably a result of her contacts with Mr. and Mrs. Nicely for the last two years [Tr. p. 60-64]. Dr. Stokes testified that the best indication of a parent's future behavior toward a child would be to assess the nature of the interactional style between the parents as it exists now and how it has existed in the past [Tr. p. 64]. He testified that on the basis of what he observed in the interactions

between parent and child, if the interactions were more negative the child would be at a greater risk [Tr. p. 65]. The primary prerequisite to a change in attitude and behavior in the style of interaction of abusing parents is the desire on the part of the parents to change. Without intervention it is difficult for a parent to change a negative or dangerous style of interaction [Tr. p. 66]. In his professional opinion the hypothetical of a beating death of a child for some two hours in which both parents participate is consistent with a well established maladapted style of interaction [Tr. p. 67].

On cross-examination, Dr. Stokes testified that he would recommend treatment for the parents who were involved in the hypothetical beating

death which would consist of providing them with a model of interaction with the child. From some parents he would expect a change for the good within three months with other parents it may take longer, depending on the existing style of interaction. The length of time that the treatment would require to make a change would depend on the current style of interaction and the extent of the behavior problems that the child has [Tr. p. 67-68]. He testified that he would look for a appreciated need for change on the part of the parents and concern for the child and their style of interaction with the child. He testified that he had not seen the report of Charles Kirby concerning his examination of Tiffany Green in this case. He had, however,

reviewed the reports of Dr. Sizemore [Tr. p. 70].

Judge Sencindiver then began to question Dr. Stokes directly. Pointing out that Joey Green was dead and that Dr. Stokes testified he would normally counsel both parents and the child, the Judge asked Dr. Stokes whether he understood that there was no child to counsel with and that Tiffany, the subject of the proceeding, had been removed from Stonegate when she was a year old. Dr. Stokes replied that he understood both of these facts [Tr. p. 71]. Judge Sencindiver then detailed a factual picture of what happened to Joey Green for the witness. This factual picture included that Joseph Green had gotten in a dispute with another child, Stuart Green had ordered Joseph Green to apologize, Joseph Green had refused to

apologize, the beatings had begun, and the child persistently continued to refuse to apologize. Judge Sencindiver then asked the expert witness if he thought Joseph Green was "strong-willed" [Tr. p. 72]. Judge Sencindiver then tried to elicit from the witness an opinion that Joseph Green was strong-willed. The witness refused to assume Judge Sencindiver's characterization of a strong-willed and stated that that type of behavior would be typical of a young child. Judge Sencindiver disagreed with the expert witness and asked what would happen if Tiffany Green were placed in the same position as Joseph Green and if Tiffany Green was strong-willed. The Judge continued his question by asking the expert witness whether or not he had conducted any tests to find out whether or not Tiffany

was strong-willed [Tr. p. 73]. Dr. Stokes replied that he did not find Tiffany Green to be strong-willed. Judged Sencindiver then stated that he had understood Dr. Stokes to say that there was a very grave risk that the same thing would happen to Tiffany if he was returned to her parents. Dr. Stokes explained that there were two issues here. One would be the concern about the placement of Tiffany back with her parents because of what happened in the past and the other would be the influence of what has happened with the major care givers of her most recent life, the Nicelys [Tr. p. 74]. Dr. Stokes continued to state that he would feel uncomfortable about Tiffany being placed with Mr. and Mrs. Green because of what had happened in the past and what had happened might be reflective of

an interactional style which might be more negative than that to which a young child should be subjected. Dr. Stokes refused to predict what would happen despite Judge Sencindiver's clear statement to Dr. Stokes that the statute required him to find a risk, a peril or a danger [Tr. p. 75]. Dr. Stokes repeated his opinion that he would look for the interactional styles and the parenting skills on the basis of the past and the present [Tr. p. 75]. Dr. Stokes resisted repeated attempts by Judge Sencindiver to have him predict what would happen between Tiffany and Mr. and Mrs. Green. The expert resisted the pressure from the Judge [Tr. p. 76]. Judge Sencindiver then began to question Dr. Stokes on the area of child abuse based upon religious beliefs [Tr. p. 77]. Judge Sencindiver drew an analogy

between the doctrine of Christian Science, i.e., and the refusal of Christian Scientists to treat their children when such treatment was required medically, and the present case involving the Greens. Dr. Stokes replied to the Judge's statement by saying that if the parents did not recognize the need to change some of their interactional style then one was dealing with an abusing family and successful outcomes with such families are much less frequent [Tr. p. 78]. Judge Sencindiver continued to stress the analogy between a believer in Christian Science and the Greens. Judge Sencindiver established a hypothetical factual scenario in which child A has pneumonia and is allowed to die by Christian Science parents and asked Dr. Stokes how he would deal with the

situation in which the same parents have another child B. Dr. Stokes answered that the situation would be difficult to deal with and that the second child would be at risk and would require some type of intervention for protection [Tr. p. 79]. The attorney for the Department then hypothetically asked Dr. Stokes whether there would be a risk to Tiffany Green if the interactional relationships of the Greens existed today as it existed at the time of Joseph Green's death and the doctor replied that there would be a risk. The expert witness was then asked by counsel for Stuart and Leslie Green whether parents could learn a positive interactional style. Before the expert witness could answer Judge Sencindiver interjected his opinion that the case involved a religious doctrine which had to be addressed because the

record contained evidence that, pursuant to the religious beliefs of the Greens, a child owes an absolute obedience to the parents [Tr. p. 80]. The witness then restated the question that had been asked of him by Stuart and Leslie Green's counsel and Judge Sencindiver again interjected his analogy between Christian Science believers and Stuart and Leslie Green. "Christian Science people of they lose a child without medical attention, they don't change their beliefs in Christian Science. To my recollection of what my observations were, they still believe in it." Judge Sencindiver also pointed out a case in some western state where parents had refused to send their children school despite judicial intervention. Judge Sencindiver then invited the counsel for

Stuart and Leslie Green to continue his questioning. [Tr. p. 81].

When counsel for Stuart and Leslie Green asked the next question dealing with whether the expert would be assisted in his analysis of interactional styles by what has happened with Julie Green in the last two years, the Judge again interrupted attempting to distinguish between Julie Green's situation and Tiffany Green's situation [Tr. p. 82]. Dr. Stokes indicated that the more information he had about Mr. and Mrs. Green and the parenting of Julie the better and sounder his prediction about future behavior would be. It was decided that the expert would read Charles Kirby's report during the noon recess [Tr. p. 83].

After the noon recess, Dr. Stokes testified that in his opinion Tiffany

Green does seem to know who Mommy and Daddy are but, that he had not been able to personally observe the interaction between Stuart and Leslie Green and Tiffany Green. Dr. Stokes also said that he would not say Tiffany Green could not adjust. Dr. Stokes testified that it would be difficult to make predictions not having further information but that Dr. Stokes was pleased to see that Stuart and Leslie Green have participated in parent education classes and that they were responsive to questions. Dr. Stokes did say that he was dissatisfied with didactic training, at which point Judge Sencindiver immediately interjected himself into the questioning [Tr. p. 86]. Judge Sencindiver attempted to elicit from the expert an opinion that the parenting education classes attended by Stuart and

Leslie Green could be descriptive but could not diagnosis problems [Tr. p. 87]. When counsel for Stuart and Leslie Green again began to question the expert witness, the Court interjected stating that it would have been an ideal laboratory condition if Joey Green had survived but that he had not [Tr. p. 88]. Dr. Stokes stated that it appeared from his review of Kirby's report that Kirby had done the same things he would have done [Tr. p. 89]. Dr. Stokes testified that he had only seen Tiffany Green late at night the night before [Tr. p. 90]. Dr. Stokes further testified that a change in disciplining which excluded corporal punishment would be a significant change. He stated in his opinion that the incident with Joey Green two years ago was probably not something that just happened [Tr. p. 9]. The

attorney for the Department then questioned the expert with a hypothetical question involving parental discipline in a group with a religious belief indicating that corporal punishment was okay [Tr. p. 92]. Dr. Stokes indicated that if such a group existed the continued use of similar disciplining procedures would create great concern in his mind. Judge Sencindiver then, sua sponte, placed on the record his synopsis of Dr. Soule's testimony, that Stuart Green had said that he viewed the death of Joseph Green as God's will. Judge Sencindiver then asked the expert whether professional intervention would help a parent with that point of view. Dr. Stokes said that it may still be possible to help such a parent but, he would not be encouraged because he would have to start with the assumption that

working with parents in abusive families is very difficult. The Judge then made two separate statements that the problem would be compounded by the existence of religious overtones [Tr. p. 94-95].

After Dr. Stokes left the stand, Judge Sencindiver, in a discussion with counsel concerning the next witness, stated ". . . there's a very narrow issue here. Should permanent custody of this child to the parents be terminated and custody given over to the Department of Welfare with leave to consent to the future adoption of the child, very narrow issue." [Tr. p. 97-98].

The Department then called Mary Nicely to the stand who testified that in the late spring of 1984 she had seen another member of the Stonegate community standing in the livingroom with a paddle in her hand [Tr. p. 99-101].

Mrs. Nicely was followed by the Department's next witness, Glen Nicely. Mr. Nicely testified that when they got Tiffany she would cry if he raised his voice to her. He further testified that when he tapped her on the butt once she cried for 30 minutes [Tr. p. 102-103]. Mr. Nicely testified that he had retired from the Federal Government for medical reasons relating to his back and that he also has diabetes [Tr. p. 104]. He further testified that until August 1, 1984, when he and Mrs. Nicely moved to Florida, Stuart or Leslie Green or both of them would visit with Tiffany at least twice a week and unless Julie was sick they would bring Julie Green to visit with Tiffany at the same time [Tr. p. 106].

The witness next called was Joseph F. Corbin, Jr. Mr. Corbin testified

that in the late spring of 1984 he had a conversation with Dr. Sizemore in which Dr. Sizemore had indicated to him that one of his preliminary findings indicated that Mr. Green may not be appropriate for custody of the children. When Mr. Corbin received Dr. Sizemore's written recommendations that statement was not contained therein [Tr. p. 110-111]. Mr. Corbin also testified that he had some difficulty because Dr. Sizemore was late getting his report into the Department [Tr. p. 112-117]. Mr. Corbin testified that the problem from the Department's point of view is that they "have seen nothing which indicates there has been a substantial change in the philosophy on behalf of the Greens as far as childrearing practices are concerned" and that the only thing they had to go on was the

psychiatric evaluations from Dr. Soule and Dr. Sizemore [Tr. p. 117]. Mr. Corbin, on cross-examination, testified that Stuart and Leslie Green and the Department had entered into a four point agreement on or about December 5, 1983 whereby the Greens had to fulfill certain conditions which were: 1. That both the Greens involve themselves with a therapist for individual counseling and that Department have access to the therapist who should be a local psychiatrist; 2. that both Mr. and Mrs. Green be involved in child growth and development programs arranged by the Department; 3. that a recommendation for Tiffany's return would depend on the point in time in which the therapist and the Department considered it safe; and, 4. that Mr. and Mrs. Green continue to cooperate with the Department's social

worker [Tr. p. 120-125]. Mr. Corbin further testified that Stuart and Leslie Green cooperated in everything that the Department asked of them in the agreement [Tr. p. 126].

Counsel for Stuart and Leslie Green began to question Mr. Corbin as to whether or not the Department caused a home study to be made of the home of Mr. and Mrs. Sandick in Baltimore. Counsel's questioning of Mr. Corbin was cut short and the Court stated "the issue now is is (sic) the parental rights going to be terminated and the custody given to the welfare to consent to the future adoption. I'm going to hold you gentlemen to a narrow line. I'm not going to let you go down 4,000 ways to get a Damascus. I don't want to have to bring in all these witnesses about what kind of home there is in

Baltimore because you lawyers love to do that in other custody cases, you bring in all people that don't know anything about the home, cross-examine, re-cross, re-recross, goes on ad infinitum; we're not going to do it in this case. Any other questions." [Tr. p. 128].

At this point the Department rested its case and motions by counsel for Stuart and Leslie Green for dismissal were overturned. Counsel's motion for dismissal was grounded on the Department having failed to make out a prima facie case. He referred to the issue of retroactive application of the new statute as the other basis for his motion. The motion was denied [Tr. p. 129].

The Respondents called as their first witness Dr. Sizemore, a psychiatrist registered to practice psychiatry

in the State of West Virginia. At the request of their attorney, Dr. Sizemore conducted a psychiatric evaluation of both Leslie Green and Stuart Green. His anaylsis of Leslie Green was that she was suffering from an adjustment disorder "purely temporary in nature and that she would return to probably normal at a later ocassion." [Tr. p. 133]. Dr. Sizemore's evaluation of Stuart Green was approximately the same. The Greens both kept all the appointments they had with him [Tr. p. 134]. Dr. Sizemore's testimony was that Mr. and Mrs. Green would be better than average parents and that they realized they made a terrible mistake [Tr. p. 138]. Dr. Sizemore testified that in his opinion both of the Greens had acknowledged their fault concerning the death of Joseph Green [Tr. p. 139]. Dr. Sizemore

further testified that he felt that the child Tiffany should be returned to Stuart and Leslie Green, that Stuart and Leslie Green should have psychiatric and mental consultation once a month for a period of one or two years and that the children should be examined by a physician at approximately three month intervals, with the Greens home surroundings being checked by the Department at their discretion [Tr. p. 139-140]. Dr. Sizemore testified that he included the physical examinations of the children and checking of the home surroundings by the Department for the benefit of the Department and the community's concerns [Tr. p. 140]. Dr. Sizemore testified that in his professional opinion the Court could safely return Tiffany to Mr. and Mrs. Green. He also testified that from his

observations he couldn't find any particular religious overtones to the incident with Joey Green [Tr. p. 141].

On cross-examination, Dr. Sizemore testified that he would not consider therapy occurring 5 times over the last 5 or 6 months to be intensive therapy [Tr. p. 143]. Dr. Sizemore also testified that he respected the opinion of Dr. Soule [Tr. p. 144]. The attorney for the Department questioned Dr. Sizemore closely on the importance of religion and religious beliefs in the death of Joseph Green [Tr. p. 145-148]. Dr. Sizemore denied on cross-examination the parents had ever denied their responsibility for the death of Joseph Green [Tr. p. 149].

Dr. Sizemore was then cross-examined by the Guardian Ad Litem for Tiffany Green. During this examination

Dr. Sizemore stated that neither Stuart nor Leslie Green were abnormal in personality and that the Department had the ability to follow the Greens for a number of years to ascertain whether or not there was any need for treatment in the way that they dealt with and managed their children [Tr. p. 151-153].

The next witness called by the parents was Mr. Charles Kirby. He testified that he works as a child psychologist-family worker at the Eastern Panhandle Medical Center [Tr. p. 154]. He has worked in that capacity for 11 years, working with children and children's cases and parent involvement with children. He is not licensed as a child psychologist in the State of West Virginia. He was admitted as an expert by the Court based upon that testimony even though counsel for Stuart and

Leslie Green began to question Mr. Kirby additionally on his background as an expert. The Court stated "The Court will accept him as an expert like I did with the other one so that neither of you can complain; one cancels out the other if its error." [Tr. p. 155]. Mr. Kirby testified that he taught Stuart and Leslie Green in three specific areas of parenting skills over eight or ten sessions in his office. Stuart and Leslie Green were present and participated in each session. Each session lasted at least an hour and one was ninety minutes. The classes were set up at the request of Mr. Corbin of the Department [Tr. p. 156]. Mr. Kirby testified that both Stuart and Leslie Green were energetic and interested in the material and worked during the sessions. He stated that they were both

very cooperative and in enthusiastic and listened and obviously prepared for each session [Tr. p. 157-158]. Mr. Kirby testified that Leslie Green had expressed positive reaction to what she was learning [Tr. p. 160].

On cross-examination Mr. Kirby stated that he had enough information to feel comfortable about his opinions as stated during his direct to the Court [Tr. p. 161]. He testified that during the 15 hours of class work he did not identify any problems that went so deep as a fundamental belief that a child must submit to the parents because it is the will of God that the child must submit to the parent [Tr. p. 162].

Leslie Green was the next witness called to the stand. She testified as to the number of children she had and that Julie Green was born October 11,

1983. She stated that she and Julie Green visited with Tiffany Green at Mary Nicely's home every other day if the weather permitted and if the weather prevented, she went at least every third day from October 5, 1982 until the time that she went to jail [Tr. p. 164-165]. Leslie Green testified that Tiffany calls her Mommy and Stuart Green Daddy. She testified that a great deal has changed concerning her treatment of children and that she has had to re-evaluate everything she knew in the past. She testified that she now understands that at different ages children go through different stages of learning and developing. She testified that she will never inflict corporal punishment on Julie [Tr. p. 166]. When she was asked if she had done everything the Department had asked her to do

pursuant to the agreement of December 5, 1983, the attorney for the Department stipulated that she had and the Court acknowledged that she had, Leslie Green testified that she accepted responsibility for the death of Joey Green [Tr. p. 167]. Leslie Green further testified that she believed the death of Joey Green was her mistake and that she wanted her children to be accepted at whatever age and whatever stage they were in and that she just "wants them there to love them". She stated that Stuart Green has moved away from Stonegate and is living with his mother and stepfather in Baltimore and she intends to join him when she gets out of jail [Tr. p. 168-169]. She testified that she needed a new beginning and that she has kept all her appointments with Dr. Sizemore [Tr. p. 170]. On cross-

examination she testified that she began to change her attitude about children within a few weeks after the death of her son, Joseph Green. She had not reached this decision prior to the time she saw Dr. Soule. She also stated that her attitude about childrearing has changed over the last 2 years and that attending classes was a part of that change [Tr. p. 171-173].

Stuart and Leslie Green's attorney then attempted to call Mrs. Sandick, Stuart Green's mother, as the next witness. The Court demanded to know why the witness was being called and when informed by Respondents' attorney that she was being called because the little girl was living with her, the Court again insisted on being told why she was being called. Respondents' counsel apparently gave up on his attempts to

call Mrs. Sandick and moved on to his next witness, Stuart Green [Tr. p. 174].

Stuart Green testified that he now lives in Baltimore, Maryland with his mother and stepfather and has done so since August 6, 1984. He has a job as a waiter in a nearby suburb of Baltimore City. He left Stonegate in order to start a new life for his family. He has not ever denied responsibility for the death of Joey and he suffered extensively as a result of the child's death and realized a lot of things about himself as a person and about his beliefs, especially concerning his children [Tr. p. 175-176]. He takes care of Julie during the day and leaves for work about 4:30 P.M. after which time his mother takes care of Julie. He has been incarcerated in the Jefferson County Jail until July 30, 1984 [Tr. p.

177]. He has been keeping his appointments as scheduled with Dr. Sizemore and learned a lot about the development of children and a new approach to disciplining children through classes that he took with Charles Kirby at the mental health center [Tr. p. 178-179].

On cross-examination Stuart Green testified that he knew immediately after the death of Joseph Green that he was wrong in his attitude about discipline and spanking [Tr. p. 180]. Stuart Green testified that his new positive parental attitude came when he took the parenting class with Mr. Kirby [Tr. p. 184]. He testified that he and Mr. Kirby never discussed the question of whether a child must submit to the will of its parents during the classes. He admitted that he did tell the police on the date of Joseph Green's death that it is not

good to let a child win and that the child must submit to the will of the parents. He stated that at one time in the past he believed that it would have been bad for Joseph Green not to submit [Tr. p. 185]. He testified that he told Mr. Corbin of the Department that he got a lot out of the classes given by Charles Kirby [Tr. p. 186].

When questioned by Tiffany Green's Guardian Ad Litem, Stuart Green testified that he would not return to Stonegate even if Stonegate moved to another state and invited people back. He testified that there were problems with that many people living in the same household [Tr. p. 187-189].

The Respondent parents' next witness was Dr. Williams, a physican licensed to practice medicine in the State of West Virginia. She has been

treating Julie Green since her birth and knows both Stuart and Leslie Green as patients ¼Tr. p. 189-191]. She testified that in her opinion she thought it would be safe to return Tiffany Green to Stuart and Leslie Green. She stated that she has seen no change in their attitudes since the death of Joey Green as far as their children are concerned and that she knew of no religious beliefs held by Stuart and Leslie Green that might hinder their caring for Tiffany Green [Tr. p. 192-193]. Dr. Williams testified that prior to the death of Joey Green she was aware of no risks [Tr. p. 194].

Dr. Stokes was called by the Department as a rebuttal witnesses. He testified that he had reviewed the report of Dr. Sizemore and based upon his review he thought there would be

some considerable risk in returning Tiffany to her parents, Stuart and Leslie Green, because it would take a period of one to two years, according to Dr. Sizemore's recommendations for the parents to improve. Dr. Stokes offered his opinion that based upon his review of Dr. Sizemore's report it would be inconsistent with the welfare of the child to return the child to the parents because the child would be at risk during that one to two years [Tr. p. 195-196]. On cross-examination, counsel for Stuart and Leslie Green began to ask Dr. Stokes if the fact of approximately two years of uninterrupted living with one or both of the parents on the part of Julie Green without evidence of abusive treatment would have any meaning. Counsel's question was interrupted by the Court who pointed out

that there was no evidence of any abuse but that no one knows what goes on in Baltimore or in the secrecy of the bedroom or bathroom [Tr. p. 199]. Dr. Stokes testified that he had not met with the parents and that he could not testify as what definitly happened in this situation but that given the serious of the circumstances he would have considerable caution in making a recommendation that it would be appropriate to return Tiffany Green to her parents [Tr. p. 200].

After discussion and summarizing the evidence presented before the Court, Judge Sencindiver stated his ruling on the record. Judge Sencindiver stated his refusal to follow the least restrictive alternative rationale [Tr. p. 227] and denied Stuart and Leslie Green's request for an improvement period,

citing as his reason that he was "satisfied that there is no reasonable likelihood that the cause of the abuse will not occur again" [Tr. p. 230-231]. The trial court then permanently terminated the parently rights of Stuart and Leslie Green in and to Tiffany Green and committed Tiffany Green to the custody of the Department with power to consent to the adoption. On December 11, 1984, Judge Sencindiver signed an Order dated October 2, 1984 containing his findings of fact, conclusions of law and determinations.

The Petitioners now bring this appeal.

ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

1. The circuit court erred in failing to follow the procedures governing the immediate or emergency

taking of a child by the Department as established in West Virginia Code §49-6-1 et. seq.

2. The circuit court erred in failing to follow the procedure governing the temporary or continuing custody of the Department in a child taken pursuant to an emergency or imminent danger as established in West Virginia Code §49-6-1 et. seq.

3. The circuit court erred in retroactively applying definitive aspects of child welfare statutes effective on June 10, 1984, to circumstances existent. on October 6, 1982 when the Department filed its petition.

4. The circuit court erred in refusing to consider less restrictive alternatives although such alternatives were available and despite the absence

of clear and convincing evidence that there was no reasonable likelihood of substantial correction of the conditions of abuse.

5. The circuit court erred in failing to allow the Petitioners a fair and impartial hearing before an unbiased tribunal.

6. The circuit court erred in denying the Petitioners an improvement period despite the absence of compelling circumstances justifying such a denial.

7. The circuit court erred in failing to make findings of fact and conclusions of law on the record establishing compelling circumstances justifying the denial of an improvement period.

8. The circuit court erred in unreasonably limiting the Petitioners' cross-examination of a proposed expert

witness called by the Department as to the witness' qualifications and by qualifying said witness as an expert without sufficient evidence of his qualifications.

9. The circuit court erred in refusing to allow Petitioners to present and cross-examine witnesses and thus did not afford Petitioners a reasonable opportunity to be heard.

10. The Petitioners were denied due process when they received ineffective assistance of counsel.

POINTS AND AUTHORITIES, DISCUSSION OF LAW AND PRAYER FOR RELIEF

I. THE PETITIONERS RESPECTFULLY SUBMIT THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT FOLLOWING THE PROCEDURES GOVERNING THE IMMEDIATE TRANSFER OF CUSTODY OF A CHILD TO THE DEPARTMENT OR THE CONTINUATION OF THAT

CUSTODY IN THE DEPARTMENT ON A TEMPORARY BASIS SET FORTH IN CHAPTER FORTY-NINE, ARTICLE SIX OF THE WEST VIRGINIA CODE.

On October 5, 1982, Joseph F. Corbin, Jr., Juvenile Probation Officer for the Department, appeared before Judge Pierre E. Dostert and the following exchange took place:

"THE COURT: What is the situation out at Stonegate?

"MR. CORBIN: According to the Trooper at the emergency hospital, a two-year old boy was beaten to death by his father earlier today.

"THE COURT: Is there any other child?

"MR. CORBIN: There is a one-year old girl in a household. According to the Trooper's interrogation of the father, the father and the mother participated in the initial beating of the deceased baby.

"THE COURT: All right, it is the judgment of the Court

that it grants temporary custody to the Department of Welfare.

"MR. CORBIN: Okay, thank you, Judge."

[Transcript of appearance of Mr. Joseph Corbin on October 5, 1982.]

Based upon the above, Judge Dostert issued his October 5, 1982 Order giving custody of Tiffany Green to Mr. Corbin until further order.

As of October 5, 1982, the legislature of West Virginia had enacted, and there was in place, a carefully structured statute establishing mandatory procedures to be followed in cases of child neglect or abuse. W.Va. Code §49-6-1 et seq. [1977]. Two specific sections of the legislation established mechanisms to be employed to protect children in circumstances of emergency or imminent danger. The first such

section was § 49-6-3, which stated, in pertinent part:

> "(a) Upon the filing of a petition, the court may order that the child be delivered for not more than ten days into the custody of the state department or a responsible relative, pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody. The initial order directing such custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of custody of such child to the state department or a responsible relative."

W.Va. Code § 49-6-3(a)[1977]

The second statutory section authorizing the emergency taking of a child dealt with the authority of a law

enforcement officer to take immediate custody of a child without court order if the child was abandoned or if the child required emergency medical treatment to which the child's parents could not would not consent. W.Va. § 49-6-9(a)]1980]. This section later specifically states:

> "(f) No child shall be taken into custody under circumstances not justified by this section or pursuant to section three [§49-6-3] of this article without appropriate process. Any retention of a child or order for retention of a child not complying with the time limits and other requirements specified in this article shall be void by operation of law."

W.Va. Code §49-6-9(f)[1980].

There can be no serious argument made against the fact that Judge Dostert's order of October 5, 1982 did not comply with the time limits and other requirements specified in Article

Six. First, despite the requirements of W.Va. Code § 49-6-3(a), no petition was filed. Second, although Judge Dostert may have legitimately inferred imminent danger to the physical well-being of the one-year old girl, the record reveals absolutely no attempt by Judge Dostert or the Department to investigate or ascertain the status of reasonably available alternatives to removal of the child. This Court has established that both statutory prerequisites must be met before the trial court can exercise the emergency-taking power. State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979). Third, Judge Dostert's order of February 5, 1982 does not appoint counsel. Fourth, Judge Dostert's order does not schedule a preliminary hearing. Fifth, Judge Dostert's order does not contain any inherent limitation on its duration.

Under the clear directive of W.Va. Code § 49-6-9(f), Judge Dostert's order for the retention of Tiffany Green was void by operation of law. In an obvious attempt to retroactively correct the statutory deficiencies of the October 5, 1982 order, the petition of Mr. Corbin of the Department was filed on October 6, 1982 and Judge Sencindiver issued an Order on that same day which appointed counsel for all the parties and established a hearing date of October 13, 1982.

Initially, the issue of whether an illegal taking can be made retroactively legal must be addressed. There is little doubt that prior to and after the enactment of the specific procedures detailed in the Child Welfare statutes passed into law in 1977, the doctrine of parens patriae would have authorized any

West Virginia court of competent jurisdiction to move expeditiously and decisively to remove a child from a position of imminent danger even if such a removal disturbed the established due process rights of the child's parents. In re Willis, 207 S.E.2d 129, 138 (1973). However, the statutory language relied upon by the trial court in In re Willis to effect the initial emergency taking of the child in that case (which emergency taking was later approved on appeal) required the filing of a petition and the opinion specifically indicates such a petition was filed. Id, at 207 S.E.2d 139.

The statutory requirements in effect as of October, 1982 were more detailed and explicit than those in effect when In re Willis was decided. To the extent the West Virginia Code

added statutory constraints to the exercise of the State's parens patriae power, Judge Dostert was obligated to acknowledge those constraints, Thus, even though Judge Dostert's violation of the statutory constraints on his authority might not offend the Greens' due process rights under the doctrine of parens patriae, said violations most certainly removed from the Greens the equal protection of the laws and due process under the West Virginia statute. U.S. CONST. amend. XIV, §1. On that basis alone, Judge Dostert's October 5, 1982 order could not be retroactively corrected. Judge Dostert's October 5, 1982 order represented and was an unconstitutional abuse of judicial authority. Petitioners respectfully argue that an unconstitutional taking cannot retroactively be made

constitutional anymore than an unconstitutional and illegal arrest can be made retroactively legitimate. Adding to the impact of this argument is the clear language of W.Va. Code § 49-6-9(f) that "any retention of a child or order for retention of a child not complying with the . . . requirements specified in this article shall be void by operation of law." Obviously, pursuant to this statutory mandate, Judge Dostert's order was void and the taking of Tiffany Green illegal. As pointed out hereinabove, the only instances in which a child could be taken without a court order in 1982 were rigidly restricted to the two situations described in W.Va.§49-6-9(a). Neither of those circumstances (abandonment or required emergency medical

treatment were alleged or demonstrated by the Department in this case.

Assuming arguendo, that Judge Sencindiver's October 6, 1982 order could have effectively dispelled the illegality of Tiffany Green's removal from her natural mother, subsequent events which occurred in this case while it was before the trial court still constitute reversible error. Pursuant to Judge Sencindiver's order of October 6, 1982, a hearing was held on October 13, 1982. Whether this hearing was to act as the preliminary hearing referenced in W.Va. Code § 49-6-3 [1977] or the hearing established in W.Va. Code § 49-6-2 [1980] becomes of critical importance. Judge Sencindiver's order of October 6, 1982 displays some confusion over the difference between the hearing referenced in § 49-6-3 and the

hearing established in §49-6-2, in that said order advises the Greens of the "purpose of said hearing and that the disposition of this matter may be resolved in a permanent termination of parental rights." However, clearly the trial court thought the purpose of the October 13, 1982 hearing was to fulfill at least the first step of a two-step process established in Article 6, Chapter 49.

"The statutory procedure for terminating parental rights in child abuse and neglect cases is essentially a two-step process. In the initial phase, the circuit court is required by W.Va. Code § 49-6-2 to determine whether the child has been abused or neglected." State v. C.N.S., 319 S.E.2d 775, 780 (W. Va. 1984) "Once there has been a proper finding of abuse or neglect, the

proceedings move into the dispositional phase, which is governed by W.Va. Code § 49-6-5." Id. Although it may be possible to accomplish both stages of the procedure at one hearing, for the purposes of this argument it is only necessary to establish that the October 13, 1982 hearing was intended to be a §49-6-2 hearing. That it was intended to be such a hearing is established by two facts contained in the record. First, Judge Sencindiver acknowledged it as a part of the matter which could result in a termination of parental rights. Before parental rights could be terminated, a § 49-6-2 hearing would have to be held. Second, after the hearing of October 13, 1982, Judge Sencindiver ordered the continuation of temporary custody in the Department for

a period well beyond the thirty day limitation established in §49-6-3.

> "If the court finds at the preliminary hearing that there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period, the court may order that the child be delivered into the temporary custody of the state department or an appropriate person or agency for a period not exceeding thirty days . . ."

W. Va. Code § 49-6-3(b) [1977] (emphasis added).

The crucial importance of the statutory classification of the hearing held on October 13, 1982 is apparent when one reviews the notice requirement applicable to the preliminary hearing established in §49-6-3 as opposed to that established for the §49-6-2 hearing. Petitioners were entitled to "at least ten days' notice" prior to a hearing on the petition, W.Va. Code §

49-6-1(b) (1977). However, if the hearing was a preliminary hearing under §49-6-3, Petitioners were entitled to only "five days' actual notice". W.Va. §49-6-3(b) (1977). Judge Sencindiver's Order of October 6, 1982, gave the Petitioners less than ten days' notice of the hearing on October 13, 1982.

If it is determined that the October 13, 1982 hearing was a §49-6-2 hearing, then insufficient notice was given to the Petitioners. If it is determined that the October 13, 1982 hearing was a preliminary hearing, then the Department retained custody of Tiffany Green for almost two years without any hearing being held under §49-6-2. Both of these possible determinations will be addressed. However, initially it must be established herein, as it has been held by this Court, that

a preliminary hearing cannot take the place of an adjudicatory hearing under §49-6-2:

> Furthermore, while W.Va. Code 49-6-3(b), authorizes an alternative procedure for a court to utilize in taking temporary custody of a child by providing for an expedited preliminary hearing with notice to the parents, this procedure does not operate to bypass the hearing to determine neglect or abuse required under W.Va. Code, 49-6-2. This construction arises because of the provision in W.Va. Code, 49-6-3(b), that requires the court to find" that there are not alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period."

State v. T.C., 303 S.E.2d 684, 690-91 (1983).

A. IF THE OCTOBER 13, 1982 HEARING WAS A HEARING ON THE PETITION, THEN PETITIONERS' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED IN THAT THEY RECEIVED INSUFFICIENT NOTICE.

That this Court holds the right of a natural parent to raise his children to be a fundamental right guaranteed by the due process clauses of both the United States Constitution and the West Virginia Constitution is beyond question. See, e.g., State ex rel. Miller v. Locke, 253 S.E.2d 540, 542 (W.Va. 1979); In re Willis, 207 S.E.2d 129, 137 (W.Va. 1973); State v. T.C., 303 S.E.2d 684, 689 (W.Va. 1983). The only issue that need be addressed in this argument is whether the lack of the notice required by the statutorily established procedure deprived the Petitioners of fundamental due process. In determining whether lack of procedural due process amounts to constitutional deprivation, this Court has previously utilized a three pronged analysis:

> "First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation."

North v. West Virginia Board of Regents, 233 S.E. 2d 411, 417 (W.Va. 1977).

Applying these factors to the instant case, it quickly becomes apparent that: (1) The Department had no compelling reason to hasten to an adjudicatory hearing on the petition. The child, Tiffany Green, had already been removed from Petitioners' custody and was not in imminent danger anymore, if she ever had been. (2) The right herein involved, to raise one's own child, has been held, by this Court, to

be as valuable as "liberty" itself State ex rel. Lemaster v. Oakley, 203 S.E.2d 140, 144 (W.Va. 1974). (3) The effect of the October 13, 1982 hearing was to deprive the Petitioners of the custody of their child for almost two years before another hearing was held.

Justice Frankfurter once wrote, "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'." Joint Committee v. McGrath, 341 U.S. 123, 168 (1951)(concurring opinion). Under the statutes in effect as of October 13, 1982, a hearing under §49-6-2 could result in a determination of abuse at its beginning and in a termination of parental rights at its conclusion. "We hasten to add our belief that in most instances the loss

of one's child may be viewed as a sanction more severe than imprisonment." State ex rel. Lemaster v. Oakley, 203 S.E.2d 140, 144 (W.Va. 1974). It is the position of the Petitioners that if the hearing of October 13, 1982 was a hearing on the petition their due process rights were violated by lack of sufficient notice. See, West Virginia Department of We. ex rel. Eyster v. Keese, 297 S.E.2d 200, 202 (W.Va. 1982).

B. IF THE OCTOBER 13, 1982 HEARING WAS A PRELIMINARY HEARING THEN PETITIONERS' DUE PROCESS RIGHTS WERE VIOLATED IN THAT THEIR CHILD WAS TAKEN FROM THEM FOR ALMOST TWO YEARS WITHOUT A FINDING THAT SHE WAS AN ABUSED OR NEGLECTED CHILD.

Assuming for the sake of this argument that the hearing on October 13, 1982 was a preliminary hearing held

pursuant to § 49-6-3 and that notice to the Petitioners was therefore sufficient, this case falls squarely within the facts of State v. T.C., 303 S.E. 2d 685 (W. Va. 1983) and the trial court's decision must be reversed. In State v. T.C., as in the instant case, a preliminary hearing was held on a petition for emergency custody of a child. Evidence was adduced to show abuse to the child, but, by mutual agreement of the parties and with the consent of the circuit court, the hearing was continued and the child was placed in a foster home so the the child's mother and stepfather could undergo psychological evaluations. About eight months after the first hearing, a second hearing was held and physical custody of the child was returned to the mother and stepfather with legal custody remaining with the

Department. About a year after the first hearing date, the circuit court conducted a continuation of the earlier proceedings and restored legal and physical custody of the child to the mother and stepfather. State v. T.C., 303 S.E.2d 685, 687 (W.Va. 1983). The State appealed the circuit court's action and argued that until a hearing was held pursuant to W.Va. Code § 49-6-2 and a determination made by the circuit court, based upon the evidence and established findings of fact conclusions of law as to whether the child was abused or neglected, the circuit court had no authority to order a disposition of the child. This Court agreed with the State's argument in State v. T.C.:

> "We believe that the statutory structure is clear and that before a court can begin to make any of the dispositional alternatives

> under W.Va. Code, 49-6-5, it must have held a hearing under W.Va. Code, 49-6-2, and have determined 'whether such child is abused or neglected'."

Id., 303 S.E.2d at 688.

Furthermore, under the clear statutory mandate of W.Va. Code §49-6-2(c), prior to a dispositional order, "the court shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court." This was not done in Tiffany Green's case until July 18, 1984, some twenty-two months after she had been removed from the custody of her natural parents. It does not save this case from reversible error to point out that Judge Sencindiver's Order of October 19, 1982 reflects the consent of Stuart and Leslie Green to the Department having the "temporary

care, custody and control of Tiffany Green" because that consent is expressly limited to a continuation of the status quo until November 23,1982 only, the date next selected for said hearing. Also, as pointed out by this Court:

> "While we do not find that W.Va. Code 49-6-1, et seq., forecloses the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question, which is the issue of abuse or neglect."

State v. T.C., 303 S.E.2d 685, 690 (W.Va. 1983).

On November 19, 1982, Judge Sencindiver generally continued what he referred to as "the preliminary hearing previously set down on November 23, 1982" at the request of counsel for the

Department. In his November 19, 1982 order, Judge Sencindiver continued custody of Tiffany Green in the Department. And so the "temporary" custody of Tiffany Green remained until July 18, 1984. This "temporary" custody was illegal and obtained without due process and clearly was beyond the legislatively imposed limit of thirty days. W.Va. Code 49-6-3(b)(1977).

> Any taking and holding of a child from the custody of its natural parents is an unwarranted and unjustified intrusion by the State into the very personal family relationship, if it continues beyond any period necessary to serve the legitimate interest of government to protect the health and welfare of the minor child. The holding of the child in legal limbo away from his family and in disregard of the their rights, without adjudication of these rights, offends due process and subverts the associative benefits of the familial relationship which natural law has honored since ancient time

> and which the Constitution protects today. See Stanley v. Illinois, supra; In re Gault, supra; Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L. Ed. 2d 84 (1965); In re: Simmons Children, supra; Accord, Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243 (1906). Both this Court and the Constitution are offended by the timespan of the retention of the infant child . . . in obvious disregard of his parents' rights, his rights, and his consequent future welfare.

In re Willis, 207 S.E.2d 129, 139-40 (1973).

The record clearly reflects that the hearing of October 13, 1982 was not concluded until July 18, 1984. The hearing commenced on October 13, 1982 did not result in an order establishing Tiffany Green as an abused child until July 18, 1984. The last request for a postponement contained in the record was made on November 19, 1982 by counsel for the Department. Despite the testimony

of the Department's Ms. Kemner [Tr. p. 15-16] about the Petitioners apparent failure "to participate in bringing the hearing on again", the burden was not and never is on the parents to satisfy due process requirements in this area. The burden is on the State and its agency, the Department, to justify the continuation of its taking and holding of Tiffany Green from the custody of her natural parents as necessary to protect the health and welfare of the minor child. That Tiffany Green's health and welfare was no longer in danger was indicated by the fact that Julie Green was allowed to remain in the physical custody of the Petitioners and had come to no harm [Tr. p. 12 & p. 17]. This inconsistent treatment must be given some probative value by this Court. In re Willis, 207 S.E. 2d 129, 141-142

(W.Va. 1974). In addition, as indicated in Ms. Kemner's testimony, the Greens referred all questions to their attorney due to the pendency of criminal actions against them [Tr. p. 16]. Both the Greens faced criminal charges and this Court has previously acknowledged the chilling effect such charges may have against parents in abuse cases.

> "The potential of a criminal charge is oppressive and a parent may anticipate jeopardy arising from his testimony in the neglect proceeding before officers of the court and the State. Consequently, he may fail to adequately express his true feelings for the child involved and in support of the family relationship."

State ex rel. Lemaster v. Oakley, 203 S.E. 2d 140, 144 (W.Va. 1974).

The Greens referred all legal questions to their counsel and relied upon him in every aspect of this case.

Anytime parents are confronted with judicial

> proceedings involving the potential termination of their right to the custody of their children, the presented issues and the available defenses are most often exceedingly complex and susceptible of interpretations which may confound the most able legal counsel . . . To laymen parents, in fear of losing children of their body, the words employed in these vague charges are bewildering and paralyzing.

Id., 203 S.E. 2d at 143.

In light of the pendency of their criminal charges and their complete dependence upon counsel, the Greens were not the ones Ms. Kemner should have addressed concerning bringing on the adjudication hearing. The Department should have brought the hearing on, especially in light of the fact that its counsel requested the last postponement in the case. "After the passage of a reasonable time necessarily required to effectuate the State's interest in

protecting a child's health and welfare in an emergent situation, the onus for continued retention of the child from the custody of his natural parents falls upon the State and not upon parents." Id.

Also Judge Sencindiver's Order of July 18, 1984 specifically notes that after the conclusion of the "temporary" hearing on July 18, 1984, counsel for Stuart and Leslie Green did object to the continued "temporary" custody of Tiffany Green with the Department. Order of July 18, 1984 p. 6. Again, Judge Sencindiver was able, under the 1984 amendment to W.Va. Code § 49-6-3(b) [1984], to award temporary custody for a period of up to sixty days as opposed to the thirty day limit previously established by statute. However, Judge Sencindiver extended the temporary

custody beyond even the sixty day limit to October 2, 1984 when Petitioners' counsel informed the trial court of a scheduling conflict as to a September, 1984 hearing date. The importance, however, is not the implied waiver as to the sixty day period, but the fact that the July 18, 1984 Order does not contain any indication of an examination into or factual findings supporting the Judge Sencindiver's conclusionary statement that there are no less restrictive alternatives available than to continue the temporary custody. Such a factual finding is prerequisite to the trial court's authority to grant an extension of temporary custody after a preliminary hearing pursuant to W.Va. § 49-6-3(b) [1984]. Just as this Court has demanded that the trial court must make a record justifying the denial of an improvement

period, so should the trial court be required to establish, on the record, its findings of fact supporting its extension of temporary custody based upon its determination that there are no less restrictive alternatives. Of interest is Judge Sencindiver's acknowledgement that Julie Green is still living at Stonegate under supervisory custody. Order of July 18, 1984 p. 4. This finding of fact by the trial court actually establishes a less restrictive alternative on the record.

In sum, if the hearing of October 13, 1982 was an adjudicatory hearing, the parents were given insufficient notice and the record, conclusions and findings requirements of §49-6-2 were ignored by the trial court. If the hearing of October 13, 1982 was a preliminary hearing under § 49-6-3, then

the Greens were deprived of the custody of their child for almost two years without due process. In either event, reversible error occurred and the decision of the trial court must be reversed and the custody of Tiffany Green restored to her parents.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RETROACTIVELY APPLYING CHILD WELFARE STATUTES EFFECTIVE ON JUNE 10, 1984 TO CIRCUMSTANCES EXISTENT ON OCTOBER 6, 1982 WHEN THE DEPARTMENT FILED ITS PETITION.

In his order dated July 18, 1984, Judge Sencindiver based his denial of Stuart and Leslie Green's motion to dismiss the Department's petition upon his finding that Tiffany Green was an "abused child" as defined by W.Va. Code § 49-1-3(a) as amended by Senate Bill 85, passed March 10, 1984 and effective

as of June 10, 1984. At the hearing of October 2, 1984 [Tr. p. 129] and in his order of October 2, 1984, Judge Sencindiver expressed his opinion that the amendments effective June 10, 1984 controlled in all respects to this case. As amended by Senate Bill 84, § 49-1-3(a)(1) stated:

> (a) "Abused child" means a child whose health or welfare is harmed or threatened by:
>
> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or substantial mental or emotional injury, upon the child or another child in the home; or
>
> (2) Sexual abuse or sexual exploitation.
>
> In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

Prior to the amendment effected by Senate Bill 85, W.Va. Code §49-1-3(a)

(1977) had defined "abused child" as follows:

> "Abused child" means a child:
>
> Whose parent, guardian or custodian inflicts or attempts to inflict or allows to be inflicted as a result of inadequate supervision, physical injury or substantial emotional injury upon the child which endangers the present physical or mental health of such child or inflicts, attempts to inflict, or knowingly allows to be inflicted sexual abuse upon the child.

Ths obvious importance of which statutory definition should have been applied by the trial court goes almost without saying. The Department never presented one scintilla of evidence that Stuart or Leslie Green had ever harmed or attempted to harm Tiffany Green in any manner whatsoever. Although the emergency taking of Tiffany Green may or may not have been authorized by the

Child Welfare statutes as they existed on October 5, 1982, there is little doubt that the Department would have faced a difficult burden at best in proving by "clear and convincing proof" that Tiffany Green was an abused child as that term was defined by West Virginia law on October 5, 1982.

The Petitioners respectfuly assert that Judge Sencindiver was clearly wrong at both the July 18, 1984 hearing and the October 2, 1984 hearing in retroactively applying the definitive aspects of the 1984 amendments to this case and that his error was so prejudicial to the Petitioners' case that the disposition of Judge Sencindiver must be reversed and the child, Tiffany Green, returned to her natural parents. First, as of October 6, 1982, the date on which the Department filed its petition, W.Va.

Code §49-6-2(c)[1980], stated, in pertinent part:

> "At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof."

W.Va. Code § 49-6-2(c)[1980]. (emphasis added).

This subsection [§49-6-2(c)] had been amended in 1980 by removing a requirement that findings of abuse or neglect be based upon conditions existing not only at the time of the filing of the petition, but also at the time of hearing. The West Virginia legislature had clearly identified a single period in time, the filing of the

petition, to be used to determine the existence or non-existence of abuse or neglect. The definitive aspects of Article 6, Chapter 49 of the West Virginia Code as they existed on October 6, 1982, were in pari materia and must be applied to determine the existence of abuse or neglect as of October 6, 1982, the date of the filing of the Department's petition.

> It is well established in West Virginia that statutes which are not inconsistent with one another, and which relate to the same subject matter, are in pari materia. Statutes in pari materia should be read and construed together, the primary purpose being to ascertain the intention of the Legislature. State ex rel. Slatton v. Boles, 147 W.Va. 674, 130 S.E. 2d 192 (1963); State ex rel. Graney v. Sims, 144 W.Va. 72, 105 S.E. 2d 886 (1958); State v. Hoult, 113 W.Va. 587, 169 S.E. 241 (1933). Clearly W.Va. Code, 49-6-3, and the other sections of Article 6, Chapter 49 of the West

> Virginia Code are not inconsistent and relate to the same subject matter. They should, therefore, be read in pari materia.

State ex rel. Miller v. Locke, 253 S.E. 2d 540, 542 (W.Va. 1979)

When a statute isolates one moment in time to be used as the exclusive pertinent time for judicial examination of existing conditions, surely one of those existing conditions must be the statutory definitions defining the pertinent scope of the judicial examination.

In addition, West Virginia law has established the general rule that a statute is presumed to be prospectively applied and that retroactive application is warranted only when the legislative intent to do so is clearly indicated. See, e.g., Stanholtz v. Monongahela Power Co. 270 S.E.2d 178 (W.Va. 1980);

State v. Laws, 251 S.E. 2d 769 (W.Va. 1979)(applying general rule to Chapter 49 statute). As pointed out by Judge Sencindiver: ". . . the new statute is not a criminal-penal statute, and it contains no language whatsoever as to its retroactive effect nor its prospective effect, the legislature simply is not addressing the question." Order of July 18, 1984 p. 3. "While we do not question the legislature's wisdom in providing protections for juveniles above those constitutionally required, we do not find any authority for retroactive application of those standards since such retroactivity was not specifically provided." State v. Laws, 251 S.E. 2d 709, 773 (W.Va. 1979).

Another point must be addressed herein. As so candidly acknowledged by Judge Sencindiver in the Order of July

18, 1984, "the legislature would not have needed to reinact a statute to address the situation had the old statute applied in such circumstances." The Petitioners argue that another reason the 1984 amendments cannot be applied to this case is because the amendments were so obviously structured to fill in the legal gaps disclosed by their case. It is no coincidence that the new definition of abuse includes other children in the home as abused if one child is abused. It is no coincidence that excessive corporal punishment resulting in injury is made abuse. It is no coincidence that the 1984 amendments [§49-6-3(c)] add a specific authorization for a child protective service worker to take custody of a child prior to the filing of a petition. It is no coincidence that the

circumstances defining "no reasonable likelihood the conditions of neglect or abuse can be substantially corrected" are no longer exclusively restricted to the circumstances listed in W.Va. Code § 49-6-5(b). It is no coincidence that the Department put in its request for a resumption of the October 13, 1982 hearing on June 29, 1984, only nineteen days after Senate Bill 85 became effective.

Finally, although Judge Sencindiver was perhaps technically correct in determining that the statute is not a criminal-penal statute, it still involves the State intruding upon a fundamental right as important as a "liberty" right, for reasons of compelling importance to society as a whole, and imposes sanctions more severe than imprisonment, that is, the loss of one's

child. It would appear that in this instance, this is an ex post facto statute unconstitutionally applied to the Greens. Its application to this case underlines the incredible and unjustified delay in the Department's moving for an adjudication of the issue of abuse and provides some insight into the motivation for that delay. A statute may be constitutional as written, yet be unconstitutionally applied in a given case. State ex rel. Miller v. Locke, 253 S.E.2d 540, 543 (W.Va. 1979). The retroactive application of this statute to the Greens, when even the trial court acknowledged the legislature designed the statute to close gaps in the type of case the Department had against the Greens, constitutes an unconstitutional application requiring reversal of the trial court's

disposition and a return of Tiffany Green to her natural parents. Without the application of the amendments to this case, there was no abuse against Tiffany Green. The Department knew it and the Court knew it. Apparently everyone but the Greens and their counsel knew it. The Department waited until the new statutes were effective and moved immediately to obtain custody of Tiffany Green. And somewhere in all this legal maneuvering the Department overlooked the constitutional limits of its right to take and keep a child away from its natural parents. The Department itself judged Stuart and Leslie Green safe enough to leave Julie Green in their physical custody but steadfastly refused to make any efforts to return Tiffany Green. One cannot help but wonder why the Department

retained temporary custody of Tiffany when said custody was no longer even vaguely justified by danger to her welfare or safety and the Department's own social worker, Ms. Kemner, apparently wished to end the separation between the Greens and their daughter Tiffany.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO CONSIDER LESS RESTRICTIVE ALTERNATIVES TO PERMANENT TERMINATION OF PARENTAL RIGHTS WITHOUT CLEAR AND CONVINCING EVIDENCE THAT THERE WAS NO REASONABLE LIKELIHOOD OF SUBSTANTIAL CORRECTION OF THE CONDITIONS OF ABUSE AND BY FAILING TO ACT AS AN UNBIASED TRIBUNAL.

At the very start of the October 2, 1984 hearing, Judge Sencindiver stated the hearing was "a final hearing on the question of terminating custody". [Tr.

p. 3]. Immediately before Mary Nicely took the witness stand, Judge Sencindiver stated on the record "there's a very narrow issue here. Should permanent custody of this child to the parents be terminated and custody given over the Department of Welfare with leave to consent to the future adoption of the child, very narrow issue." [Tr. p. 97-98]. When counsel for Stuart and Leslie Green began to cross-examine Mr. Corbin concerning a home study of the paternal grandparents of Tiffany Green, Judge Sencindiver cut him off and stated: "the issue now is is (sic) the parental rights going to be terminated and the custody given to the welfare to consent to the future adoption. I'm going to hold you gentlemen to a narrow line." [Tr. p. 128].

The Petitioners respectfully argue that at no point did Judge Sencindiver consider or admit evidence of alternatives less restrictive than permanent termination of parently rights. The Petitioners also argue that the record clearly indicates Judge Sencindiver excluded consideration of said less restrictive alternatives before admission of and in the absence of evidence supporting a finding that the Greens "have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help". W.Va. § 49-6-5(b)[1984].

While recognizing that "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use

of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b)[1977] that conditions of neglect or abuse can be substantially corrected", the Petitioners argue that the burden is on the State to prove by clear and convincing evidence that there is no reasonable likelihood of substantial correction. State v. C.N.S., 319 S.E. 2d 775, 780 (W.Va. 1984). The trial court in this case rejected any consideration of less restrictive alternatives before the Department even began to present witnesses. The trial court disregarded testimony of the Department's own expert witness that with intervention by competent professionals, parents like the Greens could show improvement within three months. [Tr. p. 67-68]. Then the trial court,

in a most unusual and improper manner, attempted to lead the Department's expert into stating an opinion that there was a "grave risk" to Tiffany Green if she were returned to Stuart and Leslie Green. [Tr. p. 74]. The trial court then drew analogies between Christian Scientists and the Greens which were unsupported by facts in evidence and highly improper especially in light of W.Va. Code, § 49-1-3(g)(2)(A) [1984]. The trial court refused to allow testimony as to the status and care of July Green although Julie Green was acknowledged by the trial court and the Department's witnesses to have been in the physical custody of Stuart Green and Leslie Green since her birth. Surely, when parents can prove to the court that a younger sibling in their care is healthy and safe, that

information is relevant to determine whether the welfare of the older sibling will be seriously threatened if returned to the parents. See, State ex rel. Lemaster v. Oakley, 203 S.E. 2d 140, 142 (W.Va. 1974)(recognition by Supreme Court of Appeals of second child born to parents during pendency of juvenile proceedings then eight months old and in the care of the natural parents); In re Willis, 207 S.E.2d 129, 141-42 (W.Va. 1973)(Supreme Court of Appeals gives probative value to older children's return to an allegedly unsuitable environment without objection from welfare department while department moves to take younger child). Prior to the 1984 amendments, W.Va. Code § 49-6-5(b) [1977] would not have permitted Judge Sencindiver to find "no reasonable likelihood that conditions of

neglect or abuse can be substantially corrected" unless he could have found: (1) the Greens were addicted to or abused alcohol or drugs; (2) the Greens refused to cooperate in the development of a plan designed to return Tiffany to them; (3) the Greens failed to follow through with reasonable rehabilitative efforts; (4) the Greens abandoned Tiffany or (5) the Greens repeatedly or seriously physically abused the child. The 1984 amendment to § 49=6-5(b) added a new category of emotional illness, mental illness or mental deficiency and made the listed categories non-exclusive by adding: "Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive . . ." W.Va. Code § 49-6-5(b)[1984].

Judge Sencindiver did not make any finding of fact, nor was any evidence

produced, indicating that the Greens fit within any of the listed categories constituting and establishing "no reasonable likelihood". Indeed, the trial court ignored the testimony it could not subvert to conclude it was "satisfied that there is no reasonable likelihood that the cause of the abuse will not occur again". [Tr. p. 230-231]. Once that determination was made, the trial court felt fee under the holding of In re R.J.M., 266 S.E.2d 114 (W. Va. 1980), to by-pass the legislatively mandated precedence of the dispositional alternatives listed in W.Va. Code § 49-6-5(a) [1984]. However, the trial court failed to properly apply the "clear and convincing evidence" burden in its consideration. See, e.g., State v. Carl B., 301, S.E. 2d 864 (W.Va. 1983). The Department needed to

present clear and convincing evidence that there was no reasonable likelihood that the conditions of abuse could be substantially corrected in the near future. That simply was not done.

Each case turning on the unfitness of the natural parents must be decided on its own particular facts. In re Willis, 207 S.E.2d 129, 140 (W.Va. 1974); Pierce v. Jeffries, 137 S.E. 651 (1927). The ability of any trial court to apply law and logic to circumstances involving the possible or definite abuse or neglect of our most helpless and appealing citizens depends on large measure upon the degree of discipline and compassion possessed by the presiding judge. Discipline is required to insure the due process and equal protection rights of all the parties are protected within the statutory

definitions and procedures established to govern the various determinations involved. Compassion is required to see beyond the abuse or neglect of the past to the potential of the goal of "providing services to the children and the families so as to restore such children to their families." W.Va. Code §49-1-3 (d)(4) [1984].

When a trial court is so outraged by past abuse that it cannot bring itself, under any circumstances, to consider restoring a child to its natural parents, that trial court is incapable of exercising the degree of discipline and compassion necessary to carry out the legislative design of the Child Welfare statutes of the State of West Virginia. It is not pleasant to attack or impugn the intent or motivation of a circuit court judge swept away

from his natural discipline and compassion by what appears to be justifiable moral outrage. However, without disrespect or hostility, it must be argued before this Court that Judge Sencindiver passed beyond the boundaries of his judicial role in this case. The trial court's examination of Dr. Stokes [Tr. p. 71-79] was blatantly improper and argumentative. The trial court paid lip service to the rights of Stuart and Leslie Green but knew before evidence on October 2, 1984 what he was going to do. The hearing of October 2, 1984 was over before it began. As Judge Sencindiver stated on the record at the conclusion of the hearing:

> "Now who knows what will be done when this case gets to the Supreme Court, who knows . . . but I for one, with the oath that I have taken when I took this Bench, I cannot in conscience and good faith

> order the return of this child at any time to these parents. I cannot bring myself to do it. Now I may be wrong in law. I may be wrong in fact, but that's what we have the Supreme Court for."

[Tr. p. 225].

The individuality of each case involving the issue of parental fitness requires an impartial examination of the facts of each case and the fair application of statutory and case law to those facts. In the instant case, as displayed by the record and transcript of the hearing of October 2, 1984, that did not happen. When evidence was presented to show efforts by Stuart and Leslie Green to cooperate in everyway they were asked to do so by the Department, when Dr. Stokes testified as the Department's key witness with no personal knowledge of Stuart or Leslie Green and stated that parents involved in a fatal beating

could make positive progress in as little as three months, when the Department's witnesses acknowledged that Julie Green had lived with either Stuart or Leslie Green since her birth without signs of abuse, when Charles Kirby testified that Stuart and Leslie Green attended his parenting classes with enthusiasm, when the psychiatrist jointly selected by the parents' counsel and the Department testified that Stuart and Leslie Green were not mentally ill and would not harm Tiffany if she were returned to them, when Mr. Corbin admitted Stuart and Leslie Green had done everything the Department had asked of them, when evidence was presented that constant and unbroken contact had been maintained between Stuart, Leslie, Tiffany and Julie Green, when the paternal grandmother of Tiffany Green

was ready to testify as to the home and stability awaiting Tiffany in Baltimore, when the Department adduced evidence of, and the trial court acknowledged, the existence of possible cult influence in this case, the trial court should have assessed the evidence with logic and impartiality. Such an assessment would have resulted in the imposition of a less restrictive alternative than permanent termination of parental rights. The record of the October 2, 1984 hearing does not contain clear and convincing evidence supporting a "finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that it was "necessary for the welfare of the child, [to] terminate the parental . . . rights". W.Va. Code § 49-6-5(a)(6) [1984].

It is not necessary for Petitioners to repeat herein the other statements of Judge Sencindiver contained in the record of October 2, 1984 [Tr. p. 223-229]. It is enough to state that the legislature established a specific statutory scheme to control child abuse proceedings. The Greens were, "like any individual, entitled to a fair and impartial hearing before an unbiased tribunal" utilizing the statutes passed by the legislature. "Courts are to enforce or apply the law as written, not according to what an individual, though a judge, believes the policy in a particular situation should be." State v. See, 115 S.E.2d 144, 151-52 (W.Va. 1960).

Although this Court spite in the opinions filed in the case of In re R.J.M., 266 S.E.2d 114 (1980), insofar

as the necessity to give precedential consideration to the less restrictive alternative dispositions of the statute, it could not have been divided on the issue of whether there was at least some attempt on the part of the circuit court therein involved to make findings of fact to support its contention of "no reasonable likelihood". In the instant case there was no such attempt. This case must be reversed or this Court will be sending a clear message to every circuit court judge in West Virginia that when the incident of abuse is severe enought, the burden of proof that must be met by the State is reduced well below the "clear and convincing" evidence standard established by the legislature.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING THE

PETITIONERS AN IMPROVEMENT PERIOD ON JULY 18, 1984 DESPITE THE ABSENCE OF COMPELLING CIRCUMSTANCES TO JUSTIFY A DENIAL THEREOF.

> In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period.

W.Va. Code § 49-6-2(b) [1984]

This statute has been held to presume the entitlement of a parent to an opportunity to ameliorate the conditions or circumstances upon which a child abuse proceeding is founded prior to a final adjudication. State v. Scritchfield, 208 S.E.2d 315 (W.Va.

1981). When the trial court denies a parent's motion for an improvement period, it must state on the record the compelling circumstances warranting the denial of such motion. Id. at Syllabus Point 3 and In re Thaxton, 307 S.E.2d 465, 467 (W.Va. 1983). Failure to state the compelling circumstances on the record requires reversal.

A review of two cases in which this Court has affirmed the denal of an improvement period indicates the basis of "compelling circumstances". In State v. C.N.S., 319 S.E.2d 775, 779 (W.Va. 1984), "[t]he circuit court predicated its denial of the motion on the living conditions in the home and the appellants total disregard, prior to the removal of the children from their physical custody, of the efforts of social service agencies to improve the

conditions of neglect . . . and noted the past propensity of the family to change residences, and to leave the jurisdiction to avoid neglect charges." In the case of In re R.J.M., 266 S.E. 1d 114 (W. Va. 1980), counsel for the parents failed to request an improvement period, but because of an appellate allegation of inadequate assistance of counsel, this Court considered whether, under the facts of that case, an improvement period would have been granted and determined it should not have been because: "(1) [these parents] had permitted the child to come very close to starvation which was only averted by the intervention of outside authorities; (2) had contumaciously declined to follow the advice of qualified physicians and the Department of Welfare after the child's life had

been jeopardized; and (3) had negligently or deliberately missed doctor ' appointments and concealed themselves from representatives of the Department of Welfare." Id. In both cases the compelling circumstances consisted of the refusal of the parents to work with the Department or anyone else to improve their parenting skills. As demonstrated in testimony by the Department's witness, Mr. Corbin, at the hearing of October 2, 1984, the Greens did everything the Department asked them to do and, according to the testimony of Charles Kirby, did so with enthusiasm. The Order of July 18, 1984 lists the compelling circumstances relied upon by Judge Sencindiver to deny Stuart and Leslie Green an improvement period. They are: (1) Joseph Green, their child, died at the age of two years;

(2) Joseph Green died as a result of bruises and contusions to his buttocks and consequential shock; (3) Stuart and Leslie Green were convicted (Stuart by a plea of guilty) of causing Joseph Green's death; (4) Leslie Green began to spank Joseph Green and then Stuart Green paddled Joseph Green for two hours because Joseph Green refused to apologize for striking another child; (5) Julie Green was born as of October 11, 1982 and had been at Stonegate since her birth; (6) Tiffany Green was placed with the Nicelys at the Greens' request in October, 1982 and has been there since; (7) Stuart and Leslie Green continue to live at Stonegate. Order of July 18, 1984 p. 3-5.

Petitioners respectfully submit that said findings do not, by law, constitute compelling circumstances

justifying a denial of their request for an improvement period. These findings ignore any of the rehabilitative efforts made by the Greens and placed into evidence. These findings contain evidence that Julie Green has been allowed to reside with her natural parents. These findings do not show refusal or inability on the part of Greens to work to improve themselves or any propensity on their party to leave the jurisdiction. These findings show that almost two years before, in a tragic surrendering of judgment, the Greens paddled their son on the behind until he died. In reality, for the trial court, that finding was enough. However, under the legislative mandate, unless there is a clear danger to the child or other compelling reasons such as parental refusal to cooperate or

potential flight, an improvement period must be granted as it should have been here. The effect of not granting the Greens an improvement period was to deny them an attempt to prove and demonstrate the amelioration of the circumstances of abuse which killed Joseph Green and this denial was in derrogation of the fundamental right of a parent to the custody of his children. In re Willis, 207 S.E.2d 129 (W.Va. 1973).

The result of this denial was also to effectively prevent the Department's expert, Dr. Stokes, from evaluating the style of interaction between the Greens and Tiffany in order to ground his opinion testimony upon more than a cursory meeting with Tiffany and the Nicelys the evening before he testified. In any event, the trial court failed to state sufficient findings of fact on the

record to justify a denial of an improvement period and therefore this case should be reversed and remanded to allow an improvement period and a plan of rehabilitation to be established.

V. THE PETITIONERS DID NOT RECEIVE ADEQUATE ASSISTANCE OF LEGAL COUNSEL AND WERE THEREFORE DENIED DUE PROCESS

Parents of an allegedly abused child involved in a case of child neglect or abuse "shall have the right to be represented by counsel at every stage of the proceedings". W.Va. Code §49-6-2(a) [1984]. This Court has rejected any distinction between a person's right to counsel in criminal actions as opposed to civil actions when State power is utilized in an attempt to terminate fundamental relationships. State ex rel. Lemaster v. Oakley, 203 S.E.2d 140, 144-45 (W.Va. 1974). The

right to counsel has been held to mean effective assistance of counsel. State ex rel. Favors v. Tucker, 100 S.E. 2d 411 (W.Va. 1957), cert. denied, 357 U.S. 908 (1958). The Petitioners respectfully assert that they were denied effective assistance of counsel, that this denial of effective assistance is demonstrated on the record and that this denial of effective assistance resulted in severe prejudice to their case and a denial of their right to due process.

Petitioners acknowledge they carry a substantial burden in the presentment of this argument. Not only must Petitioners demonstrate that their trial counsel failed to exercise the normal and customary degree of skill possessed of attorneys who are reasonably knowledgeable of the law in child abuse cases, but they must further demonstrate

that said failure of trial counsel was not harmless error but instead prejudiced their case. Carrico v. Griffith, 272 S.E.2d 235 (W.Va. 1980). Instances such as their counsel's failure to either insist he be allowed to call Stuart Green's mother to stand or that the trial court establish on the record that he would not be allowed to do so [Tr. p. 174] are most probably not enough. However, the record reveals some other actions and failures to act by Petitioners' trial counsel which were substantially prejudical and downright puzzling. For instance, prior to the July 18, 1984 hearing, the Department's attorney filed a motion calling for the release of the psychiatric evaluations done on the Greens by Dr. Soule. The Motion for Release identified another individual as responsible for the death

of Joseph Green and requested the evaluations for use against that individual in a criminal action. The Motion for Release characterized the evaluations as wholly exculpatory to the Petitioners and went on to declare the reports supported the State's theory that the other individual had brainwashed the Green parents into a disciplinary belief system. It takes no legal genius to see the potential benefits to the Greens to release the evaluations. First, by statute, "[n]o evidence acquired as a result of any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person." W.Va. Code § 49-6-4 [1977]. Thus, the release of the evaluations could not hurt the Greens.

Second, if the State's theory was correct, it pinpointed how the abuse of Joseph Green occurred, what conditions existed to allow it to occur and, logically, what changes would need to be made in Stuart and Leslie Green's environment and attitude to prevent such abuse from reoccurring. However, instead of releasing the evaluations and assisting the State in the investigation of its theory, Petitioners' counsel fought release and proceeded at the October 2, 1984 hearing to discredit the possibility of the State's theory during his cross-examination of Dr. Soule [Tr. p. 50]. And yet, during that cross-examination, Petitioners' counsel revealed that two (2) years prior to the October 2, 1984 hearing, he had himself considered the possible existence of "brainwashing" and had specifically

asked Dr. Soule about it [Tr. p. 50]. Had the questioning been couched in terms of "thought-reform" or "manipulative group dynamics" or other recognized psychological terms, Dr. Soule's response may well have been different. In this regard, the record clearly establishes that Petitioners' trial counsel ignored a valid court order directing him to submit Dr. Soule's reports to the circuit court and to the Department. Despite the order, trial counsel kept the report without disclosure for almost half a year. Counsel's lack of cooperation with the Department and his motivation behind withholding the reports on the Greens, is highly suspicious in that his actions benefited no one, except perhaps the cult leader who was facing prosecution.

Mr. Brooks testified as to another incredible instance of behavior by Petitioners' counsel. According to Mr. Brooks' testimony, Petitioners' counsel had agreed to certain tests being conducted on Julie Green. Yet when Mr. Brooks arrived at the agreed upon location, Leslie Green was there with a written statement provided by Petitioners' counsel refusing the testing unless it was videotaped [Tr. p. 31]. Although attorneys may differ on how to deal with the Department in abuse cases, very few attorneys representing allegedly abusive parents set the parents up for confrontations with the Department's agents outside the presence of counsel.

And there remains the overriding questions of why, even after their indictments and convictions for

involuntary manslaughter, Petitioners' counsel directed them to refuse to speak with the Department's social workers and why the Petitioners' counsel did not bring the adjudication hearing on before the passage of Senate Bill 85. The obvious prejudicial effect of Petitioners' counsel failing to demand an earlier adjudicatory hearing is undeniable.

Finally, although not in the record of this proceeding, is a fact that must, at some point in time, be brought to the attention of this Court. Prior to his representation of the Petitioners in this case, Petitioners' trial counsel had represented the alleged "cult leader" Dorothy McClellan. Present counsel finds it inconceivable that after the filing of the Motion for Release, Petitioners' trial attorney did not

perceive himself to be in a position of conflict. Perhaps this entire matter is more appropriately reversed for a habeas corpus action, and if so, present counsel for the Petitioners respectfully requests the Court to disregard this portion of his argument.

However, as to the other points raised herein, the Petitioners assert the record of the proceedings below indicates they were denied effective assistance of counsel and that their case was prejudiced thereby. As acknowledged by this Court in State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W.Va. 1974), when a layman parent faces the loss of his child and his liberty in separate proceedings arising from the same course of events, his dependence on legal counsel becomes absolute. Ineffective assistance of counsel in a

child abuse case which prejudices the parent's opportunity to regain or retain custody of his child is necessarily a denial of due process requiring reversal.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY LIMITING PETITIONERS' CROSS-EXAMINATION OF THE DEPARTMENT'S WITNESSES AND BY REFUSING TO ALLOW PETITIONERS TO PRESENT WITNESSES

"In any proceeding under this article, the party or parties having custody of the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." W.Va. Code § 49-6-2(c) [1984]. The statutory language is clear and mandatory. Judge Sencindiver ignored that language on at least two occasions in

such a way as to prejudice the Petitioners' case. When Petitioners' counsel began to conduct voir dire as to Guy Brooks' qualifications as an expert, Judge Sencindiver stopped him [Tr. p. 29] and before permitting Petitioners' counsel any further voir dire, qualified Brooks as an expert [Tr. p. 30]. Thereafter Brooks was allowed to testify as to his opinion of Leslie Green's psychological attitude despite the fact that he had no professional expertise in that area and had only observed Leslie Green for less than one-half hour under highly charged emotional conditions [Tr. p. 33-34 and p. 38]. Incredibly, Judge Sencindiver, later in the hearing, qualified one of the Petitioners' witnesses, Charles Kirby, as an expert, made a reference to his acceptance of Mr. Brooks as an expert, and indicated

that if Mr. Brooks' qualification as an expert witness was an error, the qualification of the Petitioners' witness rectified the error [Tr. p. 155]. Judge Sencindiver's judicial version of "two wrongs make a right" is on the record for review by this Court. However, during that review, it should be noted that when Petitioners' counsel was in the process of demonstrating, by examination, the qualifications of Charles Kirby, Judge Sencindiver cut him off with a curt, "I don't care." [Tr. p. 155]. Thus Petitioners' counsel was unable to establish, on the record, the fact that Charles Kirby was indeed qualified.

Another example of Judge Sencindiver's frustration of the due process and statutory rights of the Petitioners is found in the manner in which the

trial court repeatedly interrupted the recross-examination of Dr. Stokes by Petitioners' counsel [Tr. p. 80-92]. Although a trial court must have discretion to limit the extent of recross-examination, a review of that portion of the transcript demonstrates that Judge Sencindiver was not so much administering the proceeding as he was attempting to direct and influence the testimony of Dr. Stokes. When Petitioners' counsel attempted to cross-examine Mr. Corbin on whether the Department caused a home-study to be performed on Mr. and Mrs. Sandick in Baltimore, Judge Sencindiver pointedly cut him off [Tr. p. 128].

When Petitioners' counsel attempted to call Stuart Green's mother to the witness stand, Judge Sencindiver challenged his right to do so and

demanded a reason for the witness' appearance. Petitioners' counsel indicated that Stuart Green and Julie Green were now living with the witness but Judge Sencindiver refused to accept that as adequate reason to call her as a witness and demanded an additional explanation from Petitioners' counsel. In the face of the aggression of the trial court, Petitioners' counsel gave up his attempt to call the witness [Tr. p. 174]. Again, although it can legitimately be argued that a trial court has a right to request a proffer from counsel at anytime to prevent irrelevant or unnecessarily repetitive testimony from being presented, it is interesting to note that only one such demand was made upon counsel for the Department before he placed a witness on the stand for the first time. That

ocassion was when Mary Nicely was called to the stand. At that point Judge Sencindiver inquired as to the tenor of the witness' testimony and was given a response that indicated only the question she would be asked. The trial court immediately allowed the witness to testify [Tr. p. 96-101] although the relevancy of her testimony turned out to be highly questionable.

Aside from displaying an unacceptable degree of bias, the actions of Judge Sencindiver at the October 2, 1984 hearing operated to inhibit the ability of the Petitioners to present and cross-examine witnesses in violation of the mandate of W.Va. Code § 49-6-2(c) [1984] and the due process clauses of the United States and West Virginia Constitutions. Said violations resulted

in prejudicial harm to the Petitioners' case requiring reversal.

VII. A GENERAL OBSERVATION ON REVERSAL OR REMAND

The guardian ad litum for Tiffany Green examined Ms. Kemner on the issue of bonding between the Nicelys and Tiffany Green and Petitioners' counsel responded with follow-up questions in this subject area [Tr. p. 19-20]. It is the Petitioners position in regard to the issue of bonding between Tiffany and the Nicelys, that said issue is irrelevant to this appeal and will also be irrelevant to any rehearing or further proceedings in this matter on remand, if that occurs. The Petitioners' are and always will be deeply indebted to the Nicelys for their concern and unselfish assistance and love in acting as temporary caretakers for Tiffany. However,

"[i]n the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person." In re Willis, 207 S.E.2d 129, 136 (W.Va. 1974) [citing State ex rel. Action v. Flowers, Comm'r, 174 S.E.2d 742 (W.Va. 1970); State ex rel. Kiger v. Hancock, 168 S.E.2d 798 (W.Va. 1969)]. This principle has stood in firm application even when young infant children have been held in the custody of third persons for long periods of time. See, e.g., State v. See, 115 S.E.2d 144, 150 (W.Va. 1960).

However, in recognition of the best interests of Tiffany, one of the "polar stars" to guide this Court in its deliberations, the Petitioners respectfully present that Tiffany Green is part

and parcel of a natural family unit consisting of her sister, her mother, her father and other family members ready and willing to contribute love and time to her growth and development. That natural family unit, recognized and protected by the common law and the State of West Virginia, contains its own inherent strength and value. Due to the kidness of Mr. and Mrs. Nicely, Tiffany Green has been visited by her father, mother and sister with frequency and regularity. Tiffany Green, despite an understandable bonding and affection for the Nicelys, knows and realizes that she is part of her natural family.

In the event this Court reverses the dispositional order of October 2, 1984, whether said reversal is outright and returns custody to the Petitioners, or results in the remand of the matter

for reconsideration by the circuit court, the Petitioners will cooperate with the Department in developing and implementing a plan to allow the gradual rather than sudden return of Tiffany to the natural family unit. After that return is complete, the Petitioners represent to this Court that Mr. and Mrs. Nicely will always be allowed visitation with Tiffany just as the Nicelys always allowed them visitation during the long and dark period of uncertainty and pain from which they have finally emerged.

CONCLUSION

It is respectfully submitted that the Circuit Court of Jefferson County, West Virginia, committed prejudicial and reversible error in the child abuse proceedings against the Petitioners, Stuart and Leslie Green. It is further

respectfully submitted that for the reasons assigned herein, the adjudication of abuse and the termination of parental rights in the court below should be reversed and set aside, and that the custody of Tiffany Green should be restored to her natural parents.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the 10th day of May, 1985, I mailed, via first class mail, postage prepaid, copies of the aforegoing Petition for Writ of Error and Supersedeas to Michael J. Cassell, Esquire, Assistant Prosecuting Attorney for Jefferson County, P.O. Box 729, Charles Town, West Virginia 25414, attorney for West Virginia Department of Human Services and to James B. Crawford, III, Esquire, P.O. Box 711, Charles Town, West Virginia 25414, Guardian Ad Litum for Tiffany Green, Infant.

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